SUPREME COURT, U. S.
FEB 1 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

LAWRENCE M. COHEN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ROY E. BROWNE
Hershey, Browne, Wilson, Steel,
Cook & Wolfe
1910 First National Tower
Akron, Ohio 44308
Attorneys for Tiidee Products, Inc.

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX

PAGE

Opinions Below 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting the Writ 9

I. The Questions Presented in This Case Are Integrally Intertwined with Those Which This Court Has Agreed to Review in *Food Store Employees* and Should Be Decided in Conjunction with That Case .. 9

II. The Board's Brief in *Food Store Employees* Underscores *the Interrelationship of That Case with the Instant Case* 10

III. There Is Presently a Severe Dislocation in the Administration of the Act Which Warrants Resolution by This Court 11

Conclusion 14

TABLE OF AUTHORITIES

Cases Cited

Boire v. Greyhound Corp., 376 U. S. 473 (1964) 4

Ex-Cell-O Corporation, 185 N. L. R. B. No. 20. Sum. Rev'd. and Rem'd. Sub. Nom. 6

Fleischmann Distilling Corp. v. Maier Brewing Co., 307 U. S. 161 (1967) 11, 12, 13

Graham & Foster v. Goodcell, 282 U. S. 409 (1931) 9

Hall v. Cole, 412 U. S. 1, 93 S. Ct. 1943 (1973) 11, 12

Hannah v. Larche, 363 U. S. 420 (1960) 9

Hannah v. Slawson, 363 U. S. 420 (1960) 9

H. K. Porter Company v. N. L. R. B., 397 U. S. 99 (1970) 6

International Union of Electrical, Radio and Machine Workers v. N. L. R. B. (Tiidee I), 426 F. 2d 1243 (D. C. Cir. 1970) *cert. den.*, 400 U. S. 950 (1970) 2, 4, 5, 6, 7

International Union of Electrical, Radio and Machine Workers v. N. L. R. B. (Tiidee II), 440 F. 2d 298 (D. C. Cir. 1970) 2, 5

Johnson v. U. S. Shipping Board, 280 U. S. 320 (1930) .. 9

Local 60, United Brotherhood of Carpenters v. N. L. R. B., 365 U. S. 651 (1961) 12

Mills v. Electric Auto Lite Co., 396 U. S. 375 (1970) ... 11, 12

McCulloch v. Sociedad Nacional, 372 U. S. 10 (1963) ... 9

McElroy v. Guagliardo, 361 U. S. 281 (1960) 9

N. L. R. B. v. Express Publishing Co., 312 U. S. 426 (1941) 14

N. L. R. B. v. Ralph Printing & Lithographing Co., 433 F. 2d 1058 (8th Cir. 1970) 12

N. L. R. B. v. Stafford Trucking, enc. (not officially published), 77 L. R. R. M. 2468 (7th Cir. 1971) 12

Porter v. Dicken, 328 U. S. 252 (1946) 9

Red Lion Broadcasting Co., Inc. v. F. C. C., 390 U. S. 916 (1968) 10

Reid v. Covert, 354 U. S. 1 (1957) 9

Republic Steel Corp. v. N. L. R. B., 311 U. S. 7 (1940) .. 12

Sierra Club v. Morton, 405 U. S. 727 (1972) 10

Sprague v. Ticonic National Bank, 307 U. S. 161 (1939) 11

Taylor v. McElroy, 358 U. S. 918 (1959) 9

Teamsters Local 20 v. Morton, 377 U. S. 252 (1964) 13

Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers, 196 N. L. R. B. No. 27 ..... 2, 6, 7

Tiidee Products, Inc. v. International Union of Electrical, Radio & Machine Workers, 194 N. L. R. B. No. 198 ..... 2, 6, 7

Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers, 176 N. L. R. B. 969..... 2, 4

Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers, 174 N. L. R. B. 705...2, 3, 13

United Automobile Workers v. N. L. R. B., 449 F. 2d 1046 (1971) 6

United Automobile Workers v. Russell, 356 U. S. 634 (1958) 12

United Automobile Workers v. Scofield, 382 U. S. 205 (1965) 10

United States v. Thomas, 361 U. S. 950 (1960)..... 9

White v. Mechanics' Securities Corp., 269 U. S. 283 (1925) 9

Statutes Cited

Clayton Act, § 4, 15 U. S. C. § 15..... 12

Communications Act of 1934, § 206, 47 U. S. C. § 206.. 12

Copyright Act, 17 U. S. C. § 116..... 12

Interstate Commerce Act, § 16, 49 U. S. C. § 16(2).... 12

Labor-Management Reporting and Disclosure Act of 1959, § 102, 29 U. S. C. § 412..... 11

National Labor Relations Act § 8(a)(1), (3) and (5) as amended 3, 5

National Labor Relations Act § 8(d), as amended..... 6

National Labor Relations Act § 10(e), 61 Stat. 146, as amended 3
Packers and Stockyards Act, § 309(f), 7 U. S. C. § 210(f) 12
Perishable Agricultural Commodities Act, § 7(b), 7 U. S. C. § 499g(b) 12
Securities Act of 1933, § 11(e), 15 U. S. C. § 77K(e)... 12
Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U. S. C. §§ 78i(e), 78R(a) 12
Servicemen's Readjustment Act, 38 U. S. C. § 1822(b).. 12
Trust Indenture Act, § 323(a), 53 Stat. 1176, 15 U. S. C. § 77 www(a) 12

Miscellaneous

H. Conf. Rep. No. 510 at 54, 80th Cong., 1st Sess., II Leg. Hist. 2931 13
Legal Department Report to Convention of International Union of Electrical Workers, 172 Daily Lab. Rep. E-1, E-3 (BNA, Sept. 3, 1970) 4
Memorandum in Opp. in S. Ct. No. 654, O. T. 1970, p. 3 6
S. 1958, as reported, 2nd Sen. Print, II Leg. Hist. 2905.. 13
S. 2926, 73d Cong., 2d Sess., 1 Leg. Hist. of the Taft-Hartley Act, pp. 6-7, and p. 2465 13
93 Cong. Rec. 4858 (1947) (Remarks of Senator Taft).. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Tiidee Products, Inc. ("Tiidee" or "the Company") petitions for a writ of certiorari, before judgment of the United States Court of Appeals for the District of Columbia Circuit, to review that portion of the supplemental decisions and orders of the National Labor Relations Board in the instant cases that granted attorney's fees, as well as litigation and investigation costs, to both the Government and the charging party Union incurred in the prosecution of these cases before the Board and the courts (Nos. 72-1691 and 1692 in the court below).

OPINIONS BELOW

The supplemental decisions and orders of the National Labor Relations Board, now pending on petitions for review before the Court of Appeals, are officially reported, but unpublished as of yet, at 194 N. L. R. B. No. 198 and 196 N. L. R. B. No. 27 and are printed at App. pp. 83 and 98, respectively. The original decisions of the Court of Appeals and of the Board are reported, respectively, at 426 F. 2d 1243 (D. C. Cir. 1970) *cert. den.*, 400 U. S. 950 (1970); 440 F. 2d 298 (D. C. Cir. 1970); 174 N. L. R. B. 705; and 176 N. L. R. B. 969 and are printed respectively at App., pp. 109, 132, 45, and 81.

JURISDICTION

The supplemental decisions and orders of the Board were issued on January 24, 1972 and April 6, 1972. App., pp. 83 and 98. Cross-petitions for review under 29 U. S. C. 159(f) were thereafter filed by the charging party Union and Tiidee. The cases were consolidated and briefed in the United States Court of Appeals for the District of Columbia Circuit, as Case Nos. 72-1691, 72-1692, 72-1080 and 72-1365, and oral argument was held on September 24, 1973 before a three judge panel of that Court (Robb, *J.*; Tamm, *J.*; and MacKinnon, *J.*). Jurisdiction in this matter before rendition of judgment by the Court of Appeals is conferred on this Court by 28 U. S. C. § 1254(1) and 28 U. S. C. § 2101(e).

QUESTIONS PRESENTED

On December 4, 1973, this Court granted review in *N. L. R. B.* v. *Food Store Employees Union, Local 347, Almalgamated Meat Cutters and Butcher Workmen of North America*, No. 73-370, 42 U. S. L. W. 3326 ("*Food Store Employees*"), where the Court of Appeals for the District of Columbia, relying upon the supplemental Board decisions in the present case

App., pp. 83 and 98), without remand to the Board, taxed a respondent with the litigation expenses incurred by both the Board and the charging party in the preparation and trial of an unfair labor practice case before the Board and the courts. In *Food Store Employees*, however, because of the peculiar posture of that case including the absence of the respondent as a party thereto, the following threshhold issues, presented in the instant petition, are not now before the Court:

1. Whether the Board and/or the courts have the authority under the National Labor Relations Act, 29 U. S. C. § 158, *et. seq.* ("the Act") to order a respondent to reimburse the Board, a charging party, or both for expenses incurred in the investigation, preparation and conduct of an unfair labor practice case.

2. Assuming *arguendo* the authority to impose such a remedy, must the exercise of such power be rationally related and reasonably limited, i.e., bear a proximate causal connection, to the actual conduct of the respondent or, as in the present case, may such a remedy be imposed subsequent to the date when the respondent acceded to the Board's findings and offered to comply with its obligations under the Act?

STATUTE INVOLVED

The portion of the Act relevant to this case, Section 10(c) of the National Labor Relations Act, 61 Stat. 146 as amended, is set forth in the Appendix, p. 136.

STATEMENT OF THE CASE

1. The Initial Board Decisions

On February 24, 1969, the Board found that the Company violated Sections 8(a)(1), (3) and (5) of the Act. App., p. 45; 174 NLRB 705 (*"Tiidee I"*). The 8(a)(5) violation consisted of an improper refusal to bargain with the Inter-

national Union of Electrical, Radio and Machine Workers, AFL-CIO ("the Union") following its selection by a majority of the voters in a Board-conducted election.[1] To remedy this violation and others, the Board ordered the Company to cease and desist from such unlawful conduct, to bargain with the Union, to post an appropriate notice and to engage in other affirmative acts. Although rejecting the Union's request for additional relief, including a proposed "make-whole" remedy,[2] the Board issued a "broad order" forbidding the Company from "in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

On June 24, 1969—prior to appellate review of *Tiidee I*—the Board found that the Company had engaged in other unfair labor practices, including a violation of Section 8(a)(5) by the unilateral promulgation of work rules and hiring procedures. App., p. 81; 176 NLRB 969 (*"Tiidee II"*).[3]

---

1. The refusal to bargain was predicated on the Company's original position—asserted at the Board level only when the Company was not represented by counsel—that the Board's Regional Director acted improperly in overruling the Company's objections to the election. A refusal to bargain was the only means whereby the Company could judicially contest the Regional Director's decision. See, e.g., *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 481 (1964).

2. The "make-whole" remedy, sought by the Union and rejected by the Board throughout these proceedings, would have required the Company to pay an amount equal to the alleged "losses incurred by employees based on what [it is assumed] would have been agreed upon had the employer bargained lawfully [and] . . . losses [allegedly] incurred by the Union for initiation fees and dues as well as [its organizational expenses] in securing certification." Legal Department Report to Convention of International Union of Electrical Workers, 172 Daily Lab. Rep. E-1, E-3 (BNA, Sept. 3, 1970). For a further statement of what the Union contemplated by a "make-whole" remedy, see Judge MacKinnon's dissenting opinion in *Tiidee I* at 426 F. 2d 1243, 1254 (App., p. 125).

3. The Company was still unrepresented by counsel in this succeeding round of litigation. It therefore continued to act unilaterally on the mistaken assumption that the Union's certification was invalid. See n. 1, *supra*.

2. The Initial Judicial Litigation

The Union petitioned the District of Columbia Court of Appeals in *Tiidee I* to review the Board's refusal to grant its request for additional relief and the Board cross-petitioned for enforcement of its order. The Company did not contest then, nor has it contested thereafter, the Board's 8(a)(5) order.[4] On April 3, 1970, the Court of Appeals enforced the Board's order and, over the dissent of Circuit Judge MacKinnon, concluded that the Board "had not proved a sufficient justification" for its refusal to award an additional 8(a)(5) remedy. This view was predicated on the belief that, although the Board had made no such finding, the Company had engaged in a "frivolous" refusal to bargain. The case, as a result, was remanded to the Board "with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief, in whole or in part . . . [or] believes that alternative remedies, beyond those already granted, are more appropriate". 426 F. 2d at 1253; App., p. 125.[5] The principal question thus became, and remained until the Board's supplemental decisions, an issue interjected by the

4. Upon the commencement of litigation before the Court of Appeals, the Company engaged counsel who advised that it comply with the Board's bargaining order. As a result, the Company stipulated to the 8(a)(5) violation in its brief to the Court and, following issuance of the Court's decision, promptly notified the Board of its desire to comply fully with the affirmative and negative provisions of its order. The Board, however, indicated that no compliance proceedings would be initiated until the completion of litigation although voluntary efforts were not prohibited—a suggestion which the Company readily adopted.

5. The Court's December 23, 1970 decision in *Tiidee II* (440 F. 2d 298), issued by the same majority again over Circuit Judge MacKinnon's dissent, remanded that case to the Board "for further consideration of the make-whole claim in light of . . . Tiidee II". Judge MacKinnon argued: (1) "the Board already has ample power under the remand by the majority in Tiidee I to grant all necessary remedial relief that is requested here"; (2) "this is not as strong a case as Tiidee I for the make-whole relief requested . . ."; and (3) "the majority are remanding the case here on the remedial relief question principally because of the cumulative effect of the facts here . . ." 440 F. 2d at 299 (App. p. 135).

Union: whether the Board was empowered to grant a "make-whole" remedy and/or other unprecedented remedies, and, if so, whether and to what degree such remedies were appropriate in the circumstances of this case.

A critical decision in resolving this question is *H. K. Porter Company* v. *N. L. R. B.*, 397 U. S. 99 (1970), which issued in the interval between oral argument and the decision by the Court of Appeals. The Company, therefore, petitioned the Court to reconsider its position in light of a full expression of the parties' views with respect to *Porter* as well as the Board's intervening decision in *Ex-Cell-O Corporation*, 185 NLRB No. 20, *sum. rev'd* and *rem'd. sub. nom. U. A. W.* v. *N. L. R. B.*, 449 F. 2d 1046 (1971), *rem'd vac't* and *dec. enf'd.*, 449 F. 2d 1058 (1971), where the Board expressly rejected the Court majority's views in *Tiidee I* and concluded that, by virtue of *Porter* and Section 8(d) of the Act, it had no authority to issue a "make-whole" remedy. These petitions were denied on September 21, 1970, the Court noting that the Company had filed a petition for certiorari to this Court on the remedial issue. The petition for certiorari, supported by the Union and opposed by the Board on the basis that the case "was not ripe for review" (Memorandum in Opp. in S. Ct. No. 654, O. T. 1970, p. 3), was denied, Mr. Justice Stewart being of the opinion that certiorari should be granted, by this Court on December 7, 1970. 400 U. S. 950.

3. The Board's Decisions on Remand

Despite the Company's persistent efforts to have the remand expeditiously resolved, the Board's supplemental decision in *Tiidee I* did not issue until January 21, 1972, more than two years subsequent to the denial of certiorari, and the supplemental decision in *Tiidee II* was further delayed until April 6, 1972. In *Tiidee I*, the Board, while again finding that it could not and should not order a "make-whole" remedy, adopted *pro forma* the Court's characterization of Tiidee as a frivolous liti-

gator and granted various additional 8(a)(5) remedies[6] including a requirement that the Company "reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases . . . in both the Board and court proceedings." 194 NLRB No. 198; App., p. 91. The Board subsequently refused to reconsider this decision although, as the Company urged in its post-decision motion, the award of litigation expenses had never been argued, except peripherally, in any of these lengthly proceedings, had not been urged as appropriate relief by the Board's General Counsel, and was inconsistent with the Board's own recent opinion in *Food Store Employees* (191 NLRB No. 146 (1971)). The Board, moreover, over the dissent of Chairman Miller and reluctant concurrence of Member Kennedy,[7] subsequently extended its *Tiidee I* remedy to *Tiidee II* on the basis that, notwithstanding a prior determination that there was "no merit" to a motion to consolidate the two cases (App., p. 84, n. 3), the proceedings were nevertheless so "inextricably intertwined . . . as to require the conclusion that it was part of the same pattern of . . . litigation." 196 NLRB No. 27; App., p. 100.

---

6. Such additional remedies included the obligation that the Company (1) mail copies of the Board notice to each unit employee at his home; (2) that the Union be given reasonable access to the Company's bulletin boards during the period of contract negotiations; and (3) that the Company furnish the Union with a list of the names and addresses of its employees and keep said list current for a one year period. App., p. 92.

7. In Chairman Miller's opinion the imposition of litigation expenses in *Tiidee II* was wholly unwarranted since there was no finding that "the defense here was asserted frivolously . . . [The Company's] unfair labor practices . . . are no more extensive than those committed by both unions and employers in a considerable percentage of the 800 or so cases we review each year." App., p. 103. Member Kennedy concurred in the litigation reimbursement remedy only because he believed such a result was compelled by the "law of the case" once the Board had accepted the remand. App., p. 101, n. 8.

4. The Subsequent Judicial Litigation

Petitions to review the Board's supplemental orders were thereafter filed by both the Company and the Union[8] in the District of Columbia Court of Appeals, briefed, orally argued and are now awaiting decision. In the interim, however, another panel of that Court reversed the Board's decision in *Food Store Employees* and, based on the Board's supplemental decisions in *Tiidee*, issued, without remand, a litigation cost order similar to that which the Board had approved in *Tiidee*. This Court, on the Board's petition, has now agreed to review the propriety of that action in No. 73-370, but has declined to permit the employer in that case, Heck's, the right to intervene. See 42 U. S. L. W. 3333 (December 4, 1973). Hence, the issue before the Court *assumes* two questions which would be otherwise controverted by a respondent: (1) whether either the Board or the courts possess the power to order a litigation cost remedy; and (2) whether such relief was appropriate in *Food Store Employees*. Instead, the issue presented in *Food Store Employees* is limited to whether a court of appeals could issue a litigation cost remedy *on its own* without remand to the Board. A grant of the present petition, by contrast, would permit adjudication of the merits of the basic threshhold assumptions.

8. The Company, in Nos. 72-1691 and 1692, sought review of the additional remedies, in particular the award of litigation costs, ordered by the Board while the Union, in Nos. 72-1080 and 72-1365, sought review of the failure to grant a "make-whole" remedy.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented in This Case Are Integrally Intertwined With Those Which This Court Has Agreed to Review in Food Store Employees and Should Be Decided in Conjunction With That Case

Admittedly, the grant of a writ of certiorari before judgment is necessarily limited, as stated in Rule 20 of this Court, to exceptional circumstances. One such special situation is where "there is a close relationship of [an] important question raised to"[9] one that is already pending before the Court.[10] The utilization of a certiorari before judgment procedure is especially desirable where the related matter is pending before the same appellate court which previously decided the case accepted by this Court making it likely that the two cases will be disposed of in the same manner. See, e.g., *Taylor* v. *McElroy*, 358 U. S. 918, 360 U. S. 709, 710 (1959).

The present petition not only meets these tests but presents an even more compelling consideration: the Court of Appeals decision in *Food Store Employees* was expressly predicated upon the Board's supplemental decisions in the present cases. The question of the appropriate tribunal to grant a litigation cost remedy—the issue presented by the Government in *Food Store Employees*—is also largely academic if, as the Company has contended in this case, *neither* tribunal has such power. The instant

---

9. *Porter* v. *Dicken*, 328 U. S. 252, 254 (1946).

10. See, e.g., *Hannah* v. *Slawson*, 363 U. S. 420 (1960); *United States* v. *Thomas*, 361 U. S. 950 (1960); *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 12 (1963); *Hannah* v. *Larche*, 363 U. S. 420, 422, n. 3 (1960); *McElroy* v. *Guagliardo*, 361 U. S. 281, 283 (1960); *Reid* v. *Covert*, 354 U. S. 1, 5 (1957); *White* v. *Mechanics' Securities Corp.*, 269 U. S. 283, 299 (1925); *Johnson* v. *United States Shipping Board*, 280 U. S. 320, 324-325 (1930); and *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-412, 415, n. 2 (1931).

petition presents questions which, accordingly, should be decided together with *Food Store Employees.*[11]

Resolving the instant petition in combination with *Food Store Employees,* in addition to permitting a full decision on all aspects of the issue presented in that case, would also insure a proper adjudicatory context and adequate representation of all interests involved. The employer in *Food Store Employees* is not before this Court. The respondent's interest, as a result, is presently unrepresented. Nevertheless, it is the respondent who will have to principally bear the effect of this Court's decision. The present posture of *Food Store Employees* thus offends the spirit of this Court's decision in *United Automobile Worker's* v. *Scofield,* 382 U. S. 205 (1965), as well as the principles recently articulated in such standing cases as *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). Granting the instant petition, and deciding this case in conjunction with *Food Store Employees,* would rectify this undesirable decisional posture.

II. The Board's Brief in Food Store Employees Underscores the Interrelationship of That Case with the Instant Case

Submission of the present petition was withheld until the Board filed its brief in *Food Store Employees.* That brief, which was filed with the Court on January 23, 1974, dramatically demonstrates the necessity of deciding the instant case in conjunction with *Food Store Employees.* The Board's brief discusses the present case on virtually every page. It also vigorously argues for affirmance of the Board's purported *Tiidee* distinction, in awarding litigation costs, between situations where

11. Alternatively, this Court could accomplish the same result by, on its own motion, postponing decision in *Food Store Employees* until after the Court of Appeals has resolved this case. See, e.g., *Red Lion Broadcasting Co. Inc.* v. *F. C. C.,* 390 U. S. 916 (1968); 393 U. S. 1014 (1969), and see also 395 U. S. 367 (1969). This procedure may be particularly appropriate here since more than three months have now elapsed following oral argument before the Court of Appeals. The use of such a procedure would, therefore, cause only a small delay in adjudication of *Food Store Employees.*

proffered defenses to unfair labor practice charges are "frivolous" and those instances where they are "debatable." See the Board's brief in *Food Store Employees*, pp. 11-12, 15-23. The Respondent in *Food Store Employees* has urged an even broader test than that sought by the Board, i.e., that litigation costs may also be assessed even where there is a "debatable" defense. In resolving this conflict, Tiidee's totally different position—that the Board does not have the power *in any case* to award litigation costs—should also be before the Court. It is for this reason that the present petition has been submitted.

III. There Is Presently a Severe Dislocation in the Administration of the Act Which Warrants Resolution by This Court

In light of the pendency of *Food Store Employees* before this Court there can be little question as to the importance of the questions here presented and the necessity of their determination by this Court. To reiterate, however, the propriety of the award of litigation costs is an issue which may arise in every Board proceeding. It is an issue which, in other contexts,[12] this Court has deemed worthy of review. Consideration of the full implications of the question, rather than the piecemeal and incomplete adjudication possible in *Food Store Employees*, is, therefore, warranted.

A. In *Hall* v. *Cole*, 412 U. S. 1 (1973), this Court upheld the award of attorney's fees to a private litigant in a suit under § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 412. This Court indicated, however, that, absent a controlling statute or contrart, such an award is permissible only where it seeks to punish contemptuous conduct, where it confers "a substantial benefit on the members of an ascertain-

12. See, e.g., *Hall* v. *Cole*, 412 U. S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 (1967); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939).

able class . . ." (*Mills* v. *Electric Auto Lite Co.*, 396 U. S. 375, 393-394), or possibly where the plaintiff is acting as a "private attorney general." *Hall* v. *Cole*, 412 U. S. 1, 5, n. 7 (1973). None of these considerations are present here. The Board cannot issue either compensatory, monetary or punitive awards.[13] There is, in the instant case, no common fund or class, any "private attorney general" nor need to encourage private litigation to vindicate public rights. There is no basis, in sum, to apply one of the "limited exceptions" to the general rule disfavoring the award of attorneys' fees. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. at 717-718; *Hall* v. *Cole*, 412 U. S. at 5. The present case, in contrast to *Food Store Employees*, would, in any event, permit a determination of the applicability of the *Hall* and *Fleischmann* principles to Board proceedings.

B. The award of attorneys' fees in a Board proceeding is also not warranted, in contrast to the statutory authority expressly conferred upon other agencies,[14] by either the language or legis-

13. See, e.g., *Local 60, United Brotherhood of Carpenters* v. *N. L. R. B.*, 365 U. S. 651, 655 (1961); *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12 (1940); and *United Automobile Workers* v. *Russell*, 356 U. S. 634, 646 (1958). For this reason, an assessment of attorneys' fees in a Board proceeding has, until the instant case and *Food Store Employees*, been restricted to contempt proceedings initiated against respondents who have wilfully violated court decrees enforcing Board orders. And even in this extreme situation, reimbursement of Board attorney fees is frequently not ordered. See, e.g., *N. L. R. B.* v. *Stafford Trucking, Inc.* (not officially published), 77 LRRM 2468 (7th Cir. 1971); and *N. L. R. B.* v. *Ralph Printing & Lithographing Co.*, 433 F. 2d 1058 (8th Cir. 1970).

14. See, e.g., Clayton Act, § 4, 15 U. S. C. § 15; Communications Act of 1934. § 206, 47 U. S. C. § 206; Copyright Act, 17 U. S. C. § 116; Interstate Commerce Act, § 16, 49 U. S. C. § 16(2); Packers and Stockyards Act, § 309(f), 7 U. S. C. § 210(f); Perishable Agricultural Commodities Act, § 7(b), 7 U. S. C. § 499g(b); Securities Act of 1933, § 11(e), 15 U. S. C. § 77k(e); Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U. S. C. §§ 78i(e), 78r(a); Servicemen's Readjustment Act, 38 U. S. C. § 1822(b); and Trust Indenture Act, § 323(a), 53 Stat. 1176, 15 U. S. C. § 77www(a).

lative history of the Act.[15] Significantly, even the substantially stronger language of Section 303 of the Act, which allows any person injured by an unlawful secondary boycott to "recover the damages by him sustained *and the cost of the suit*" (emphasis added), has been consistently construed as not authorizing the prevailing party to recover attorneys' fees. See *Teamsters Local 20* v. *Morton*, 377 U. S. 252, 260, n. 16 (1964). Moreover, "the time, expense and difficulties inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." *Fleischmann Distilling Corp.* v. *Maier*, 386 U. S. at 718 (citations omitted). Such a substantial burden, it is submitted, should be imposed only by this Court.

C. Finally, even assuming *arguendo* that either the Board or the courts of appeal have the power to grant a litigation cost remedy, it is necessary that this Court set the appropriate standards for the exercise of that power. For example, in the instant case the Board issued such an award in response to conduct which is not proximately related to the costs assessed. Here, after the Board's initial decision in *Tiidee I*, the alleged "frivolous" objections, the admitted basis for the unprecedented litigation cost remedy, were withdrawn. From that point forward further proceedings up to the Board's supple-

15. A specific provision permitting the Board to order violators to "pay damages", found in the Taft-Hartley Act as originally introduced (S. 2926, 73d Cong., 2d Sess. 1 Leg. Hist. of the Taft-Hartley Act, pp. 6-7), and an even milder provision allowing "restitution" (1 Leg. Hist. 2465), were later deleted following extensive hearings in both the House and Senate. The final version of the bill, as reported by both Congressional Committees, only authorized the Board ". . . to take such affirmative action, including reinstatement with or without backpay as will effectuate the policies of this Act." S. 1958, as reported, 2nd Sen. Print, II Leg. Hist. 2905; see also, H. Conf. Rep. No. 510 at 54, 80th Cong., 1st Sess., II Leg. Hist. 2931. Similarly, in considering a proposal to give the Board authority to assess damages for breach of collective bargaining agreements or in secondary boycott cases under the Taft-Hartley amendments, the chief sponsor of the bill, Senator Taft, noted that there then existed "no possibility of a suit for damages" under the Board's extant powers. 93 Cong. Rec. 4858 (1947).

mental decisions solely concerned the Union's effort to obtain extraordinary sanctions and, in particular, its unsuccessful effort to obtain a "make-whole" remedy. Such a remedy is in no way "persuasively related to the proven unlawful conduct." *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 433 (1941). Assessing Tiidee for the costs for the Union's efforts and the Government's opposition to those efforts only penalizes the Company for properly, and, indeed, for the most part successfully, resisting the imposition of a novel remedy. In sum, the award of additional costs in such a case is simply a punitive measure not calculated to reimburse the Union or the Board for any damages proximately caused by Tiidee. Such an award, if permitted, substantially modifies this Court's earlier decisions[16] and requires a clear approval by this Court.

CONCLUSION

For all the foregoing reasons, Tiidee respectfully prays that this Court grant the petition for a writ of certiorari before judgment or, alternatively, postpone decision in *Food Store Employees* until after the Court of Appeals has resolved the instant case.

Respectfully submitted,

LAWRENCE M. COHEN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ROY E. BROWNE
Hershey, Browne, Wilson, Steel,
Cook & Wolfe
1910 First National Tower
Akron, Ohio 44308
Attorneys for Tiidee Products, Inc.

16. See the cases cited at n. 12, *supra*.

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 1 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIDEE PRODUCTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Gunthorp-Warren Printing Company, Chicago, 6 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX.

PAGE

Chronological List of Relevant Docket Entries. In the matter of:

Int'l Union of Electrical, Radio & Machine Wrks., AFL-CIO 1

Chronological List of Relevant Docket Entries. In the matter of:

Tiidee Products, Inc. 4

Original Board Decisions

Tiidee Products, Inc. v. Interational Union of Electrical, Radio and Machine Workers. (Tiidee I) Trial Examiners Decision 6

174 NLRB No. 103 45

Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers. (Tiidee II) Trial Examiners Decision 47

176 NLRB No. 133 81

Supplemental Board Decisions

Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers. (Supplemental Decision and Order)

194 NLRB No. 198 (Tiidee I) 83

196 NLRB No. 27 (Tiidee II) 98

Court of Appeals' Decisions

International Union of Electrical, Radio and Machine Workers v. NLRB. (D. C. Cir. 1970)

Tiidee I 109

Tiidee II 132

Relevant Statutory Section:

29 U. S. C. § 160(c) 136

APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Int'l Union of Electrical, Radio & Machine Wrks., AFL-CIO

Case No.: 9-CA-4440, *et al.*

9–21–67	Charge filed in 9-CA-4440
9–22–67	Amended charge filed
10–23–67	Second amended charge filed
10–23–67	Charge filed in 9-CA-4488
11– 6–67	Amended charge filed in 9-CA-4488
11–14–67	Complaint & notice of hearing issued in 9-CA-4440
11–30–67	Second amended charge filed in 9-CA-4488
11–30–67	Charge filed in 9-CA-4536
12–14–67	Complaint & notice of hearing issued in 9-CA-4488
12–14–67	Complaint & notice of hearing issued in 9-CA-4536
Undated	Tiidee Products Inc's[1] answer to complaint in 9-CA-4440
Undated	Tiidee Products Inc's answer to complaint in 9-CA-4488
Undated	Tiidee Products Inc's answer to complaint in 9-CA-4536
12–14–67	Regional Director's order consolidating cases, dated
12–21–67	Order postponing hearing, dated
12–22–67	Charge filed in 9-CA-4536
12–29–67	Complaint & notice of hearing issued in 9-CA-4563

1. Tiidee Products Inc. was Respondent before the Board.
2. Petitioner herein was Charging Party before the Board.

12–29–67	Regional Director's order consolidating cases, dated
1– 9–68	Tiidee Products Inc's answer to complaint in 9-CA-4563, dated
1–16–68	Hearing opened
1–18–68	Hearing closed
8–28–68	Trial Examiner's Decision issued
9–27–68	Tiidee Products Inc's[1] motion to consolidate & reopen the record, received (motion denied, see page 1, footnote 2, of the Board's Decision and Order)
9–27–68	Tiidee Products Inc's exceptions to the T. X. Decision, received
9–30–68	Petitioner's[2] exceptions to the T. X. Decision, received
2–24–68	Decision and Order issued by the National Labor Relations Board, dated
5–26–70	Board's notice stating that the parties be afforded an opportunity to file statements of position and briefs with respect to the remand, dated
6–24–70	Tiidee Products Inc's letter, requesting copy of letter withdrawing date for receipt of briefs and that parties be advised as to status of case, dated
6–26–70	Board's letter in response to Tiidee Products Inc's request setting the date for filing statements of position pursuant to the Court's remand, dated
1–13–71	Petitioner's letter requesting an extension of time to submit a written statement of position, dated
1–15–71	Tiidee Products Inc's letter opposing Petitioner's request for an extension of time to submit a written statement of position, dated

1. Supra.
2. Supra.

1–19–71	Board's letter advising all parties that their statements of position with respect to the Court's remand should be submitted to the Board two weeks thereafter, dated
2–17–71	Petitioner's statement of position, received
2–18–71	Petitioner's motion to consolidate cases, received
2–18–71	Tiidee Products Inc's statement of position, received
3– 3–71	Tiidee Products Inc's response to Petitioner's position on remand, received
3–22–71	Tiidee Products Inc's supplemental statement of position, received
1–24–71	Supplemental Decision and Order issued by the National Labor Relations Board, dated
2–14–72	Tiidee Products Inc's[1] motion for reconsideration, and request for oral argument (denied, see Board's order denying motions dated March 10, 1972) received
2–14–72	Tiidee Products Inc's motion to stay effectiveness of Board's Order, received
2–24–72	Tiidee Products Inc's letter correcting its motion for reconsideration, dated
3– 6–72	General Counsel's opposition to Tiidee Products Inc's motion to stay effectiveness of Board's Order, received
3–10–72	Board's Order denying Tiidee Products Inc's motions, dated
3–16–72	Board's Order correcting order denying motions, dated

1. Supra.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Tiidee Products, Inc.
Case Nos.: 9-CA-4618, 9-CA-4639-2, and 9-CA-4710

2- 7-68	Charge filed in Case No. 9-CA-4618
2-29-68	Charge filed in Case No. 9-CA-4639
3- 7-68	Amended Charge filed in Case No. 9-CA-4618
3-15-68	Charge filed in Case No. 9-CA-4639-2
3-28-68	Second Amended Charge filed in Case No. 9-CA-4618
4-11-68	Regional Director's Order Consolidating Cases, dated
4-11-68	Regional Director issued Complaint and Notice of Hearing in Case No. 9-CA-4639-2, dated
4-11-68	Regional Director issued Complaint and Notice of Hearing in Case No. 9-CA-4618, dated
4-18-68	Petitioner's Answer to Complaint in Case No. 9-CA-4618, received
4-18-68	Petitioner's Answer to Complaint in Case No. 9-CA-4639-2, received
4-30-68	Regional Director's Order Postponing Hearing, dated
7-19-68	Regional Director issued Complaint and Notice of Hearing in Case No. 9-CA-4710, dated
7-19-68	Regional Director's Order Consolidating Cases, dated
7-24-68	Petitioner's Answer to Complaint, received
8-20-68	Regional Director's Order Postponing Hearing, dated
9-18-68	Hearing opened

9–19–68	Hearing closed
4–11–69	Trial Examiner William W. Kapell's Decision issued
5– 5–69	Charging Party's Exceptions to the Trial Examiner's Decision, received
5– 6–69	Petitioner's Exceptions to the Trial Examiner's Decision, received
6–24–69	Decision and Order issued by the National Labor Relations Board
2–16–71	Petitioner's Statement of Position, dated
2–17–71	Charging Party's Statement of Position on Remand, dated
2–17–71	Charging Party's Motion to Consolidate Cases, dated
3– 2–71	Petitioner's Response to the Charging Party's Position on Remand, dated
3–19–71	Petitioner's Supplemental Statement of Position, dated
4– 1–71	Petitioner's letter in support of its position, dated
4– 6–71	Charging Party's letter in opposition to Petitioner's letter, dated
6– 3–71	Petitioner's letter requesting the Board to proceed to an immediate consideration and decision, dated
4– 6–72	Supplemental Decision and Order issued by the National Labor Relations Board
4–13–72	Board's Order Correcting Supplemental Decision and Order

TXD—486—68
Dayton, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Washington, D. C.

TIIDEE PRODUCTS, INC. and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO	Cases 9-CA-4440 9-CA-4488 9-CA-4536 9-CA-4563

Cassius B. Gravitt, Jr., and *Stephen S. Frockt*, Esqs., of Cincinnati, Ohio, for the General Counsel.

Ronald H. Janetzke, Esq., of Kettering, Ohio, and *Mr. Forrest Lacy*, of Dayton, Ohio, for the Charging Party.

Messrs. Harvey B. Rector and James N. Rector (Rector & Associates), of North Lawrence, Ohio, for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

Gordon J. Myatt, Trial Examiner: In Case 9-CA-4440 the original charge was filed on September 21, 1967,[1] by International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter called the Union). Amended charges

1. All dates herein refer to 1967, unless otherwise indicated.

in this case were filed on September 22 and October 23, respectively. On November 14, Complaint and Notice of Hearing issued alleging that Tiidee Products, Inc. (hereinafter referred to as Respondent), had committed violations of Sections 8(a)(1) and (3) of the Act by unlawfully interrogating employees about their activities on behalf of the Union, by threatening to cease operations if the Union became the employees' bargaining representative, by threatening to take reprisals against employees if the Union became their bargaining representative, by discriminatorily selecting employees for layoff, and by discriminatorily discharging employees because of their support of the Union.

In Case 9-CA-4488 the original charge was filed by the Union on October 23, and amended charges were filed on November 6 and 30. On December 14, Complaint and Notice of Hearing issued based on these charges alleging that the Respondent committed additional violations of Section 8(a)(1) and (3) of the Act. This complaint alleged that the Respondent discriminatorily changed terms and conditions of employment of employee-supporters of the Union, that the Respondent discriminatorily selected employees for layoff, and discriminatorily discharged an employee for engaging in activities on behalf of the Union.

On November 30, another charge was filed by the Union in case 9-CA-4536, and on December 14, Complaint and Notice of Hearing issued. The Complaint alleged that the Respondent unlawfully refused to bargain with the Union as the certified representative of its employees in an appropriate unit. On December 22, the Union filed an additional charge in Case 9-CA-4563, and on December 29, Complaint and Notice of Hearing issued against the Respondent alleging further violations of Section 8(a)(1) and (3) of the Act. All of the above cases were consolidated for purposes of trial by an Order issued by the Regional Director for Region 9 on December 29. This matter

was tried before me on January 16, 17, and 18, 1968, in Dayton, Ohio. All counsel and representatives were afforded full opportunity to be heard and to introduce relevant evidence. Briefs were submitted by all of the parties, and they have been fully considered by me in arriving at my decision.

Upon the entire record of these proceedings, including my evaluation of the testimony of the witnesses based on my observation of their demeanor and on the relevant evidence, I make the following:

Findings of Fact

I. Jurisdictional Findings

The Respondent in an Ohio corporation engaged in the manufacture of metal and plastic parts for mobile homes and travel trailers and maintains its plant and principal place of business in Dayton, Ohio. During the past calendar year, the Respondent manufactured and shipped goods and products valued in excess of $50,000 directly from its plant in Dayton, Ohio, to points located outside the State of Ohio. On the basis of the foregoing I find and conclude that the Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

International Union of Electrical, Radio & Machine Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Respondent's Refusal to Bargain

The undisputed evidence shows that the Union commenced its organizing campaign in July. A petition was filed on August 1, and the parties entered into an Agreement for Consent Elec-

tion on September 1.[2] The Agreement for Consent Election provided, in part:

> SECRET BALLOT.—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, as the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining * * * Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, provided that the determination of the Regional Director *shall be final and binding* upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect to any amendment of any certification resulting therefrom shall also be final. [Emphasis supplied]
>
> * * * * *
>
> 6. OBJECTIONS, CHALLENGES, REPORTS THEREON.—Objections to the conduct of the election or conduct affecting the results of the election or to a determination of representatives based on the results thereof, may be filed with the Regional Director within 5 days after issuance of the Tally of Ballots * * * The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges,

---

2. The petition (Case 9-RC-7368), the Agreement for Consent Election, the Tally of Ballots, Respondent's Objections to the Election, and the Reports on Objections to the Election and the Report on Objections and Certification of Representatives are in evidence as General Counsel's Exhibits 1(hh) through 1(ll).

> *including the question whether a hearing shall be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.* [Emphasis supplied].

The appropriate unit for purposes of collective bargaining was described as:

> All production and maintenance employees at the Employer's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

On September 14, a secret-ballot election was held which resulted in 19 votes for the Union, 6 against, and 3 challenged ballots.[3] The Respondent filed timely objections to the election, stating in essence: (1) that the Union distributed a leaflet to the employees on the day of the election "which specifically changed the election issues established by [the] NLRB"; and (2) that the Union violated the Consent Agreement by challenging employees who were on the eligibility list. The Regional Director conducted an administrative investigation, and on the basis of his findings, issued a report overruling the Respondent's objections and certifying the Union as the exclusive bargaining representative of the employees.

On November 10, the Union's attorney directed a letter to Hollander, president of the Respondent, requesting certain information deemed necessary to enable the Union to engage in collective bargaining and requested that a meeting be arranged between the parties as soon as possible. On that same date the Union's attorney addressed a letter to the Respondent's labor consultant suggesting that the parties meet to commence negotiations for a collective-bargaining contract on November 15. Although the Respondent did not reply to either letter, two representatives from the Union, Reese and Brown, and two members from the employees' committee went to the Respond-

3. The Tally of Ballots indicates that there were approximately 28 eligible voters in the unit.

ent's plant on November 15, for the purpose of commencing negotiations. Hollander refused to engage in collective bargaining and suggested that the union contingent contact his labor consultant. On November 20, the union president, Lacy, forwarded a letter to Respondent's labor consultant renewing the Union's request for negotiations and for the information previously sought. On November 22, the Respondent's labor consultant advised the Union's attorney in a letter that the Respondent would not comply with the certification issued by the Regional Director and that the Respondent considered that "the Regional Director acted arbitrarily and capriciously by denying the employer his right to due process." In this letter the labor consultant advised the Union that he could not meet with them "until all litigation is disposed of." The Union renewed its request for negotiations in letters directed to the Respondent's representative on November 27 and December 18.[4]

Hollander was called as an adverse witness by the General Counsel and examined under Rule 43(b). Hollander admitted that he had not bargained with the Union and would not do so because the circulars passed out by the Union on the morning of the election violated, in his judgment, the Board's "24 hour" rule and gave the Union an unfair advantage. He also stated that he would not bargain while the charges were pending against the Respondent. It was also contended that the Regional Director denied the Respondent due process by making an administrative determination concerning the objections to the election rather than affording the Respondent the opportunity of a hearing.

The Respondent's assault on the validity of the Regional Director's certification of the Union as the exclusive bargaining representative of the employees is without merit. The objections were investigated and on the basis of the results of that investigation, a determination was made. Under the very terms

4. The Union submitted a draft of a collective-bargaining agreement and proposals covering pension, health, and life insurance benefits. The Respondent made no reply to the Union's proposals.

of the Agreement for Consent Election the method of investigation, including the question of whether a hearing shall be held, was a matter which rested solely within the discretion of the Regional Director, and his decision in this regard was final and binding on the parties. It is well settled that a Regional Director's Decision in a consent-election situation will stand in the absence of evidence of "fraud, misconduct, or such gross mistakes as to imply bad faith." *Sumner Sand & Gravel Company,* 128 NLRB 1368, 1371, enfd. 293 F. 2d 754 (C. A. 9). Beyond the bald assertion that the Regional Director acted arbitrarily and capriciously, the Respondent has failed to come forth with any evidence whatsoever that would even suggest that the Regional Director's determination should be questioned. Nor does Respondent's claim that it was denied due process alter this conclusion. The Union freely acknowledged having engaged in the conduct which the Respondent cited as objectionable, and there was no factual issue in contention. The claim that a hearing is required under these circumstances is frivolous. "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests" *Fay* v. *Douds,* 172 F. 2d 720, 725 (C. A. 2). As the Regional Director's Report on Objections clearly indicates, the Respondent's contentions were thoroughly presented during the administrative investigation and considered in the Report itself. Thus it is evident that a hearing in these circumstances, where no factual disputes existed, would be nothing more than "a senseless and useless formality." *Air Control Products, Inc.* v. *N. L. R. B.,* 335 F. 2d 245, 249 (C. A. 5). See also *Carlisle Paper Box Company* v. *N. L. R. B.,* 68 LRRM 2831 (C. A. 3), decided July 17, 1968.

Accordingly, I find that the Regional Director's Certification of Representative is valid, and is final and binding on the Respondent. It follows, therefore, that the Respondent has engaged in and is engaging in conduct in violation of Section 8(a)(5) of the Act by refusing to bargain with the Union.

In addition to questioning the validity of the Certification, the Respondent's letter dated November 22, stated that it would not meet with the Union "until all litigation is disposed of." Pending Board proceedings or pending unfair labor practice charges do not relieve an employer of his statutory obligation to bargain with the collective-bargaining representative of his employees, and the refusal to do so until the proceedings have been disposed of is clear evidence that the employer is seeking to avoid the obligations imposed by statute. I find therefore that the Respondent's refusal to meet with the Union until pending litigation is disposed of constitutes a separate violation of Section 8(a)(5) of the Act. *Greer Stop Nut Company, a division of Kaynar Manufacturing Co., Inc.*, 162 NLRB No. 47; *Kit Manufacturing Company, Inc.*, 142 NLRB 957, 971.

I also find that the Respondent committed a further violation of Section 8(a)(5) of the Act by ignoring the Union's request for information pertaining to the employees. The information sought by the Union dealt with existing wages and fringe benefits, and the request for this data by the bargaining representative is presumptively lawful. *Weber Veneer & Plywood Company*, 161 NLRB 1054, 1056; *Curtiss-Wright Corporation, Wright Aeronautical Division*, 145 NLRB 152, enfd. 347 F. 2d 61 (C. A. 3). The Respondent offered nothing to rebut this presumption, but rather simply refused to deal with the Union in any manner. In these circumstances, the conclusion that the Respondent further violated Section 8(a)(5) is inescapable.

B. *The Other Unlawful Conduct*

1. The events prior to the election

The Union's efforts to organize the employees began in July. Employee Tackett contacted Reese, a representative of the Union, and arranged to have her meet with several of the Respondent's employees at Tackett's home. Shortly after this meeting Tackett and the employees who attended began to dis-

tribute authorization cards and solicit signatures from their fellow employees.

Later that same month, the Union intensified its organizational drive by handbilling the employees in front of the Respondent's plant. The evidence indicates that this was the first time that the Respondent's officials became aware of the Union's efforts. A few days after the handbilling, Respondent's president, Hollander, told Donald Gearing[5] that he did not like unions and "if they got in, he would close the doors" and he and Gearing "would go fishing." According to Gearing, Hollander told him to listen around the plant for talk about the Union. Gearing testified that on another occasion in July, Hollander spoke to him about the Union and stated, "that if the Union got in, only the 'dedicated' employees would work and all of the rest [of the employees] would go." Hollander on the other hand categorically denied all statements attributed to him by Gearing, and testified that it was Gearing who came to him shortly after the handbilling incident and stated that he (Gearing) would quit if the plant became unionized.

Having observed these witnesses while testifying, and considering Hollander's intransigent and hostile attitude toward the very concept of union representation for the employees and his actions following the representation election, I credit the testimony of Gearing. Hollander's statements to Gearing were consistent with the course of conduct adopted by the Respondent in opposing the Union both during the organizing campaign and after the election.

Hollander also spoke to employee Haywood about the union activity in the plant. Haywood testified that Hollander told him in August that "if there is anything that you can find out [about the Union], I would appreciate it," and that "it would never be forgotten." According to Haywood, Hollander promised that he would be "taken care of," and that he (Haywood) had been in

5. Gearing is alleged by the General Counsel to be a supervisor. His status is treated, *infra*, in this Decision.

enough trouble and Hollander didn't want to see him get into any more.[6] Haywood testified that he later reported to Hollander that there were six employees on his side. According to Haywood, Hollander replied that he thought that the people on the assembly table were responsible for the trouble.

Hollander denied asking Haywood to ferret out information about the union activity among the employees. He stated that Haywood volunteered to do so, and he cautioned him to mind his own business. In view of my impression of Hollander, and considering his overall conduct in opposing the Union, I credit the testimony of Haywood.[7]

Employee Linton credibly testified that Mevin Hershey, also alleged to be a supervisor,[8] told him, shortly after the Union handbilled the plant, that the Respondent would not recognize a union and would close down and go fishing. During this conversation Hershey asked Linton if he knew anything about the Union. Linton testified that prior to the election, Hershey called him at home on the telephone and asked him "to talk up the Teamsters" among the employees, and to try to find out which of the employees would object to this Union.[9] Hershey, who appeared as a witness, denied discussing the Union with Linton, but did acknowledge that he was aware that Linton had formerly been a member of the Teamsters because the employee volunteered that information. On the basis of my observation of these

6. Haywood apparently had served a prison term prior to working for the Respondent.

7. In addition to the request by Hollander, Haywood also testified that Gearing asked him to find out all that he could about the Union and report back. Haywood stated this request was made in July, and he refused to comply with it.

8. As in the case of Gearing, the Respondent denied that Hershey was a supervisor. His status will likewise be determined subsequently to this Decision.

9. It is not clear in this record whether Hershey made this request during their initial conversation in July, or at some subsequent date.

witnesses, I find and conclude that Hershey did in fact make these statements to Linton.

On August 1, a meeting of approximately 12 of the female employees was held in Hollander's office. Gearing complained to Hollander about the women being off the floor because it was interfering with production. He was told not to worry about it as the employees were talking about the Union. When the meeting was concluded, Hollander came out of the office and told Gearing that the employees had voted 11 to 1 to get rid of him. Hollander informed Gearing that he "pushed them too hard" in their work and did not get along with people. Gearing subsequently gathered his tools and left the Respondent's plant.

On August 5, employee Tackett was injured in an automobile accident and remained home for approximately 5 weeks thereafter. During her convalescence Tackett acted in a liaison capacity between the employees and the Union. While at home Tackett received a visit from Hollander, who inquired as to how she was getting along and if she needed any financial assistance. Hollander gave Tackett $50 to help her along. According to Tackett, Hollander indicated that it was a "gift from him, but that if she wanted to pay it back, she could do so at her leisure.

During the latter part of August, Mary Burgher, another alleged supervisor,[10] began to solicit signatures from the Respondent's employees on a petition which she was circulating in the plant. She was accompanied on this mission by Ward, another senior employee. The petition was actually a poll by which the employees were to indicate whether or not they wanted an election to determine if they should be represented by a union. In each case the employee was informed by Burgher to sign his or her name and indicate yes or no. Employees Linton, Wells, Virgil Brummitt, William Brummitt, and Graham signed

10. Burgher's supervisory status is also in contention, and will be dealt with subsequently herein.

the petition and placed "no" behind their names.[11] Several employees refused to sign the petition. These employees were Awmiller, Morgan, Haywood, and Venters. Venters testified that when she refused to sign, Burgher told her that she had to do so. However, Venters remained adamant in her refusal. Employee Cash testified that when she was approached by Burgher, she indicated that she did not care one way or the other about the election and did not sign the petition. Another employee, Cullars, informed Burgher that she wanted more time to think the matter over. She was not approached thereafter by Burgher concerning the petition. Employee Reagan testified that Burgher signed her name to the petition and indicated "no" after her name. Reagan thought the matter over and subsequently went to Burgher and insisted that her name be erased. Employee Wilson signed the petition at the request of Burgher but subsequently went to Burgher and asked that her name be stricken. According to Wilson, Burgher replied that she (Burgher) was proud to sign her name to the petition.[12] Tackett, at home convalescing while the poll was being taken, was contacted by telephone by Burgher and asked if she would sign the petition. Tackett was noncommital in her reply and there is no indication that her name was attached to the petition.[13]

Although Hollander disclaimed any knowledge of the petition which Burgher had been circulating, the unrefuted evidence shows that Burgher took the petition into Hollander's office after she had secured the signatures. Burgher testified that she circulated the petition because employee Linton was talking about the

11. William Brummitt testified that he was told by Linton that Hershey wanted all employees in the plastics department to sign "no."

12. There is no indication in the record that Burgher ever deleted Wilson's name from the petition.

13. During this same conversation Burgher asked Tackett if she knew who among the employees started the union activity and what, if anything, she knew about the Union. In addition to remaining noncommittal about the petition, Tackett professed to know nothing about the Union.

Teamsters Union and the Charging Union had passed out literature informing employees that a Board election would be held at the plant. Burgher claimed that she conducted the survey to determine how the employees felt about the matter, and that she intended to give the petition to the Board.

After she had polled the employees, Burgher questioned a number of them individually about the Union. The unrefuted testimony shows that on August 31, Burgher asked employee Wells how he felt the Union's campaign was going. Burgher told Wells that she was going to vote against the Union. In another conversation with Wells shortly before September 14, Burgher told him that someone in the shop represented the Union members and she wondered who it was. She asked Wells if he was the person, and when he denied it, Burgher stated that she was only "kidding."

During the week preceding the election on September 14, Burgher asked employee Reagan her views on the outcome of the election. This employee told Burgher that she was going to "kill Burgher's 'no' vote." During this same week Burgher approached employee Venters and asked her who was going to be the observer for the Union at the election. Burgher also asked this employee if she knew who started the Union. On the day of the election Burgher sought to get the name of the union observer from employee Wilson. When Wilson replied that she was going to be the observer, Burgher refused to believe her.

Burgher also played a minor role in conversation between Hollander and several employeees. Sometime during the latter part of August, employee Jones asked Burgher if she could see Hollander. After Burgher determined that it was possible, she accompanied Jones into Hollander's office. Jones was upset and threatened to quit her job because she was having difficulty with several of the employees in the plant. Hollander asked Jones if she knew who started "this." Jones replied that no one had said anything about the Union to her. Hollander then

stated that he had not mentioned the work union, whereupon Jones replied, "No, you didn't, but I know what you mean." Hollander then turned to Burgher and said, "She'd be surprised if she knew, wouldn't she, Mary?" Burgher replied in the affirmative. Hollander then informed Jones that "we know a lot more than you think we know." Hollander assured Jones that matters would work out in the plant, and he asked her if she was aware of what had happened to Gearing. When Jones indicated that she had heard from the other employees that Gearing had been fired, Hollander stated, "We have our own way of taking care of troublemakers.[14]

A week before the election Burgher came to employee Cash's machine and instructed her to go to Hollander's office. Burgher followed Cash into the office. When they arrived, Hollander informed Cash that he had heard from Burgher that she was brooding over the fact that she had not been given a raise in pay. Hollander told Cash that he could not give her a raise while the matter with the Union was pending because it would look as if it were a bribe. Hollander promised her a 10-cent-an-hour increase once the "trouble" was over. As Cash was leaving Hollander's office he told her that the union people were a bunch of "damn Communists." Hollander also showed Cash some of his records indicating the amount of profit he was making on table legs which were being produced in the plant. Later that day, Hollander stopped by Cash's machine and asked her if she had learned anything from their conversation that morning. When Cash indicated that she had, he replied, "Well, some people think that grass is always greener on the other side, until they get there."[15]

---

14. Jones' version of this conversation was unrefuted in the record.

15. Cash's testimony concerning her conversation with Hollander is not controverted in the record.

2. The events after the election

As previously noted, the election was held on September 14, and the Union received 19 votes with 6 votes cast against union representation and 3 ballots were challenged. Tackett was the employee observer for the Union during the election. After the Board agent announced the results to the assembled employees, Hollander grabbed Tackett's arm and said, "Do you mean . . . after all that I have done for you! I gave you $50 to save your house." Hollander than asked Tackett if she had anything to say to the employees and repeated this statement until Tackett then turned and announced the results of the election again.[16]

The following day when the employees reported to work, shortly after 7:30 a.m., they found the plant locked. A notice was posted on the door stating that the doors would not be opened until 7:45 a.m. Normally the doors to the plant were open when the employees arrived. When employees Tackett and Virgil Brummitt reported to the plastics department, they were instructed by Hershey to grind up the 10 foot sections of hoses which the employees intended to prepare for shipment. Both Tackett and Brummitt protested that the hoses were not defective and should not be destroyed.[17] Hershey, however, insisted that the hoses had to be scrapped.

After the hoses were destroyed, Hershey informed Tackett that he had no work available and sent her to Hollander. At approximately 10 a.m. Hollander laid Tackett off, citing lack

16. Hollander testified that the Board agent made his announcement in such a low tone that he was not certain that the employees heard the results. According to Hollander, he then asked Tackett to repeat the tally to the employees, and he denied grabbing her arm or expressing anger. I do not credit Hollander's version of this incident.

17. Tackett testified that the 10-foot sections were left from a run of hoses which were originally 25 feet in length. She stated that the Respondent had a request for 15-foot hoses and filled this order by cutting the desired length from the longer section of hoses. Tackett stated that the remaining sections could not be defective, and that they should have been prepared for shipment.

of work as the reason. He instructed her to contact him by telephone the following Tuesday to determine whether there was work available. When Tackett called as instructed, she was told that the Respondent had no work for her. The following day Tackett again attempted to contact the Respondent, but Hollander refused to talk to her and instructed his secretary to inform Tackett that there was no work available. Tackett was recalled on September 25, and worked for approximately a week. She was subsequently laid off again on September 29, because there was no work. The following week when Tackett went to the Respondent's office to pick up her paycheck, Hollander asked her to repay the $50 he had given her in August. When Tackett said that she thought it was a gift, Hollander indicated that it was once a gift, but he did not consider it to be such now. He told Tackett that she was "an unappreciative employee."

Employee Virgil Brummitt was also laid off on September 15 at approximately 11 a.m. He was informed that there was no work available and he was instructed to remain in contact with the Respondent. Brummitt remained in layoff status for several weeks and was then recalled. After working for approximately 7 days, Brummitt was laid off again and then recalled.

Employee Morgan was laid off on September 15 at approximately 3:30 p.m. because of lack of work. Morgan was polishing castings at the time of his layoff, and he testified that there was sufficient work to carry him through the following day. Morgan contacted the Respondent's office the following Tuesday and was told that there was still no work available. He was instructed to remain in contact with the Respondent. Morgan did not contact the Respondent for more than a month, and when he did, he was informed that there was only a single day's work available.[18]

18. Hollander testified that he had attempted to get in touch with Morgan during that month to recall him to work, but was unable to do so.

The day after the election, the results were the topic of conversation around the Respondent's plant. The uncontroverted testimony indicates that Burgher approached employee Jones and asked her how she had voted in the election. Jones replied that she had voted "the right way." All of employees testified that a sign was posted by the timeclock stating, "I know who." There was no signature attached to the bottom of the sign. Burgher testified that she put the sign up because someone had jammed the timeclock. According to Burgher, she wanted to indicate that she knew who was responsible. In view of the Respondent's continuous acts of harassment and retaliation against the employees after the election, I find Burgher's explanation entirely unpersuasive. I find, therefore, that the sign was posted to indicated that the Respondent's officials were aware of the identity of the employees who supported the union.

On September 18, employee Reagan reported to work and was informed that she would not be allowed to work because of an oil leak in her machine. Hollander told Reagan that he would have to order a part for the machine. Reagan testified that in the past when her machine was broken, she was allowed to work on other machines or was given other duties in the plant. On September 20, Reagan was recalled and worked until her discharge the following day.[19]

On September 19, when employee Sawmiller reported to work she was informed by Hollander that her machine had broken down, and that she would be laid off until the machine was repaired.[20] Sawmiller contacted the Respondent the following day and was informed that her machine was still not repaired. She was not recalled to work until September 26. Sawmiller worked several days thereafter and then was laid off again

19. The circumstances surrounding Reagan's discharge will be discussed later herein.

20. Sawmiller did not work on September 18, but testified that her machine was operating correctly the preceding Friday.

due to lack of work. On October 6, Sawmiller returned to the plant to pick up her paycheck. Hollander noticed that she was not feeling well and suggested that she see a doctor. Later that day, Sawmiller called Hollander and informed him that she was 3 months pregnant and that she had complications with a kidney infection. Hollander told the employee to call him back when she was better. On October 31, Sawmiller called Hollander and was informed that it was the Repondent's policy not to allow pregnant woman to work in the shop, therefore she was discharged.[21]

On September 20, Hollander laid off employees, Cash, Cullars, and Graham. In each instance lack of work was cited as the reason. Cash was laid off at noontime and the Respondent never recalled her. Cullars was recalled on September 25, and she was laid off several times thereafter. The record does not indicate when Graham was recalled, but this employee testified that she was recalled and laid off many times after September 20, and that each time she was laid off, she was informed that there was no work.

On September 20, Hollander came into the plant and accused employee Wilson of having one of the male employees unload a truck for her. Hollander told Wilson that if she wanted anything done she was to come to him or to Burgher. He concluded the conversation by telling Wilson "You better watch your step, and your mouth too." At the end of the workday, Wilson was told by Hollander not to come to work the next day because there was none available. She was instructed to contact him the following Monday. Wilson testified that there was work available in the plant at the time of her layoff and that she had been

21. Hollander testified that the Respondent initiated this policy for the safety and benefit of female employees who become pregnant. Sawmiller and Venters credibly testified that at least two other female employees were allowed to work in the plant while they were pregnant. Venters stated that she overheard Burgher tell one of these employees that she could work until her 6th month of pregnancy, and that the employee wore maternity clothes while working in the plant.

recalled and laid off several times after September 20 and that on each occasion there was work available in the plant.

On September 21, Ward came over to the machine that Reagan was operating and commented that it was "a shame the way the employees had done the Respondent." Reagan then accused Ward of being in favor of the Union, and this accusation so upset Ward that she spoke to Burgher about it. Burgher and Ward went into the Respondent's office and reported the incident to Hollander. Hollander came out of his office and motioned all of the employees over to Reagan's machine. According to Reagan, Hollander would not allow her to speak and accused her of having a big mouth and threatened to throw her out of the plant. He had Ward repeat what Reagan said to her, and he then fired Reagan for talking about the Union while on the job. Venters, who was standing in the group of employees, testified that Hollander then turned to her and stated "that goes for you, too." According to Venters, Hollander then told her to "get [her] ass back to work and that [she] had raised enough hell and started enough rumors." Venters testified that Hollander stated, "You are making your bed and I will see that you pay for it." He then stated that he had been in "this mess before."

Hollander acknowledged that he fired Reagan because she was creating friction and she discussed the Union on the job. He admitted that he ordered Venters back to work, but denied swearing at her. Ward and another employee (Wilson) testified concerning this incident and gave a version substantially similar to that of Hollander. All witnesses agreed that Hollander fired Reagan because she was discussing the Union while on the job and that he ordered Venters back to work. The only area of conflict concerns the exact statements made by him while doing so. Considering the entitre pattern of Hollander's conduct, both prior and subsequent to the election, and considering the prominent role that Ward played in unlawful poll of the employees in August, I am persuaded that Hollander made the statements

attributed to him by Venters. Consequently, I credit her version of this incident.

On October 10, employee Jones was laid off because Hollander claimed that a shipment of cables was lost and he had no other work for her. Jones testified that in the past when she did not perform her usual duties, she was assigned work elsewhere in the plant.[22]

During the week of October 16, Jones and Venters were working at the assembly tables. Burgher instructed Venters to operate a machine which fed parts to Jones for assembly. Shortly after Venters began running the machine, she discovered that she was catching up with Jones and that they were failing to assemble the required parts. Because of this Venters returned to the assembly table and began working with Jones on her own initiative. Burgher questioned this and called Hollander into the plant. When the employees explained the difficulty, Hollander told them that he would allow the employees to work together at the table provided they produced 125 parts a day. In the past these employees jointly produced 75 parts each day. Several days later Hollander came into the plant and asked Jones and Venters if they were producing the 125 parts that he insisted upon. The employees informed him that this was impossible and that they were only able to produce 100 parts. Hollander then demanded 125 parts "or else." On October 21, Venters left the Respondent's employment and never returned, although she had received several calls from Hollander asking her to do so.

Employee Linton testified concerning several conversations with Hershey and Hollander about the Union after the election. He stated that 2 or 3 weeks after the election Hershey told him that the names of the four instigators of the Union were "mud."[23]

22. Jones was also laid off on December 20 for a 3-day period.

23. There was no indication as to who these instigators were considered to be.

Linton further testified that in November Hershey asked him if he had said anything about the Union around the plant and he told Linton that his days were "numbered." After charges were filed by the Union, Linton received a letter from the Board agent requesting information to be used in the investigation of the charges. Linton called Hershey at his home and informed him of the letter. Hershey came to Linton's home and took the letter and subsequently invited Linton over to his home. Hershey told Linton that he wanted him to call the Regional Office of the Board and inform them that he was interested in the Union and wanted to find out what was going on. According to Linton, Hershey gave no explanation as to why he wanted Linton to do this. While Linton was at Hershey's home, Hollander came there and told the employee that he could not order him to make the call to the Regional Office, but that he would like for him to do it.[24]

Sometime in December employee Haywood was laid off for an alleged lack of work. On December 29, Haywood returned to the Respondent's office to pick up his paycheck. While there Hollander asked Haywood how he had voted in the election. Haywood replied that he had voted for the Union. Hollander then stated that he knew this but wanted to see what the employee would say.

During the period following the election and continuing the first of the following year, the Respondent hired four new employees. Although the record is not absolutely clear on this point, it appears that two of the employees were hired sometime between October and December, and that they performed jobs that the employees in layoff status would have normally performed. The remaining two employees were hired sometime during the first part of 1968.

---

24. There is no indication in the record that Linton ever made such a call to the Regional Office.

Concluded Findings

The initial issue to be resolved in this case is the status of Gearing, Burgher, and Hershey. The Respondent takes the position that Gearing was never designated foreman and that he in fact usurped the title and authority of this position. The Respondent further claims that Burgher was the oldest and most experienced employee, completely familiar with Respondent's entire operation, and that she simply trained new employees when they initially reported to the job. With respect to Hershey, the Respondent alleges that this individual is the technical engineer in charge of design, cost, and tooling, and in addition is responsible for quality control. Respondent denies that Hershey possesses any supervisory authority whatsoever. The relevant facts, however, do not support the Respondent's position with respect to these three individuals.

Gearing credibly testified that he was originally hired as a maintenance man and that after a few weeks the Respondent placed him on a salary ($10,000 per year) with the understanding that he would run the plant. Hollander admitted that Gearing was placed on salary, but states that this was done in order to allow Gearing to earn a fixed sum of money without working long hours of overtime each week.[25] Gearing testified that he had authority to give work to employees, to see that the production was maintained, and to transfer employees from one job assignment to another. His testimony in this regard was corroborated by employees Wells, Sawmiller, Reagan, Haywood, and Morgan. Each of these employees testified that Gearing had authority to grant them time off for emergency leave or for illness and that he responsibly directed their work. There is evidence in the record that Hollander not only considered

25. Hollander claimed that Gearing worked 60 to 80 hours a week. It is significant to note that while Hollander professed to be concerned about the long hours Gearing was working, he complained, while testifying, that Gearing was no longer willing to put in the extra hours after he became salaried.

Gearing the foreman, but also informed at least one employee that Gearing occupied this position. The unrefuted testimony of Haywood indicates that when he was hired, Hollander told him that he would take instructions from Scarpelli, the toolmaker, because the foreman (Gearing) was in the hospital. On the basis of the above, it is clear that Gearing had authority to responsibly direct the work of the employees, to change their job assignments, to grant them time off, and to require them to work overtime if needed. It is also clear that the employees regarded Gearing as their supervisor.[26] *Huberta Coal Co., Inc.,* 168 NLRB No. 22. On the basis of the above, I find and conclude that Gearing was the Respondent's foreman, and that he was a supervisor within the meaning of Section 2(11) of the Act. *Stratford Lithographers, Inc.,* 168 NLRB No. 65; *Newland Knitting Mills,* 165 NLRB No. 104.

Respondent's contention that Burgher was nothing more than a senior employee who acted in the capacity of the leadgirl, also lacks persuasive force. The evidence discloses that from October 1966 until May 1967, a portion of the Respondent's operation was housed in a temporary plant located a considerable distance from the main plant. This division in the operation was caused by a fire which destroyed a portion of the main plant. It is undisputed that Burgher was the only person in charge of the six or seven female employees who worked in the temporary building, and that Hollander only visited the temporary building for short periods of time during the workweek. The employees who worked under Burgher in the temporary building credibly testified that she had the authority to, and in fact did, grant them time off for emergency situations. Further, that she assigned them duties and saw to it

26. The Respondent's claim that Gearing usurped the authority that he exercised in the plant is completely unpersuasive. From my observation of Hollander, I am of the firm belief that this employer would not have allowed anyone to assert any supervisory authority in the plant unless he specifically authorized it.

that they were carried out. The evidence also indicates that when Gearing was fired Burgher assumed his duties and directed all of the employees in the plant with the exception of the employees in the plastics department. Several employees testified that they were told by Hollander at the time they were hired that they would take their instructions from Burgher. Moreover, it is abundantly clear that Burgher regularly transmitted information concerning employees' conduct to Hollander, and that on the basis of information supplied by Burgher that Hollander took action affecting the employees. Considering all of the above, I find and conclude that Burgher was a supervisor within the meaning of Section 2(11) of the Act. *Huberta Coal Co., Inc., supra; Newland Knitting Mills, supra.*

The evidence is equally as compelling concerning the supervisory status of Hershey. Hershey hired employee Linton and informed him at the time of hire what his rate of pay would be. Employees Linton, Tackett, Virgil and William Brummitt credibly testified that Hershey gave them their job assignments, transferred them from one job to another, and granted them time off when they requested it. Accordingly, I find and conclude that Hershey was also a supervisor within the meaning of Section 2(11) of the Act.

Having determined that Gearing, Burgher, and Hershey were supervisors, it necessarily follows that the Respondent is responsible for the conduct and statements of these individuals. *Webb Tractor and Epuipment Company,* 167 NLRB No. 46. This record is replete with instances of unlawful conduct engaged in by the three supervisors and by the Respondent's president, commencing shortly after the handbilling of the plant in July. Hollander's threat to close up the plant and go fishing if the Union became the bargaining representative was repeated by Gearing and Hershey to employees Haywood and Linton. This statement carried the clear threat that the employees would face a loss of employment due to plant closure if they selected the Union as their representative. There are

numerous instances of unlawful interrogation of employees by the supervisors concerning union activities in the plant. Gearing admitted questioning Sawmiller to determine who was responsible for causing the Union to organize the employees. Hershey made a similar attempt to get information concerning the Union from employee Linton. Burgher was particularly active in this regard, and repeatedly questioned employees in an effort to determine the identity of the union adherents and the extent of the union activity among the employees. That such conduct by supervisors interferes with, restrains, and coerces employees in the exercise of their statutory rights is too fundamental to warrant citation. I find, therefore, that the Respondent violated Section 8(a)(1) of the Act by the above conduct of its supervisors.

In addition to the above unlawful conduct, Burgher polled the employees in order to determine their views about union representation. This poll was conducted at a time when representation proceedings were pending before the Board, and it is clear that the poll was not for the purpose of determining whether or not the Respondent should recognize the Union as the majority representative of the employees. *Blue Flash Express, Inc.*, 109 NLRB 591, 593. Accordingly, I find and conclude that the Respondent committed a further violation of Section 8(a)(1) of the Act when Supervisor Burgher conducted an unlawful poll to determine the extent of employee support for the Union. *Han-Dee Spring & Mfg. Co., Inc.*, 132 NLRB 1542.

The Respondent also violated Section 8(a)(1) when Gearing and Hollander on separate occasions attempted to enlist the aid of employee Haywood to check with other employees and to find out whatever he could about the Union. It is plain that both Gearing and Hollander were seeking to use this employee as an informer to ascertain the extent of the union activity among the employees. This effort on the part of the Respondent's president and foreman further violates Section 8(a)(1) of the Act. *Atlas Engine Works, Inc.*, 163 NLRB No. 61.

The Respondent's attempt to interfere with and thwart the union activity of its employees did not cease after the election established that a clear majority of the employees desired union representation. Indeed, the evidence discloses that after the election, the Respondent's unlawful activities intensified. The day following the election Tackett, the union observer during the election, was laid off at 10 a.m., and Virgil Brummitt was laid off an hour later. Morgan was laid off at 3:30 p.m. that same day. On September 18, Reagan was not allowed to work at all because of an alleged defect in her machine, and on September 19, Sawmiller also informed that she could not work because her machine needed repairing. On September 20, Cash, Cullars, and Graham were laid off.

Although the Respondent asserts an economic defense, the evidence overwhelmingly supports the General Counsel's claim that the layoffs were unlawfully motivated. After expressing strong displeasure over the results of the election in the presence of all the employees, Hollander began laying off employees the very next day. There was no prior indication that a work curtailment was contemplated. It is significant to note that Tackett was the first employee selected for layoff that morning. Of equal significance is the fact that the Respondent departed from the past practice of finding other jobs around the plant for the employees during slow periods, e.g., cleaning machinery, washing windows, and general maintenance work. Thus, it is apparent that Hollander was carrying out the threat voiced to Gearing when he stated, "that if the Union got in, he would keep the 'dedicated' employees and get rid of the rest." While the record shows that only two employees were actually fired, it is clear from the Respondent's treatment of the employees after the election that Hollander was seeking to achieve his purpose by penalizing the employees for voting for the Union, thereby discouraging their membership in the Union.

Additional evidence of this unlawful motivation is contained in Hollander's statements to employees during the week follow-

ing the election. He told employee Wilson "to watch her step and her mouth", and he stated to employee Venters that "you're making your bed and I'll see that you pay for it." He also told Venters that he had been in "this mess before."[27] Hollander continued his harassment of the employees by suddenly increasing the production quota of the employees working at the assembly table. He demanded that these employees, Jones and Venters, produce 125 parts a day, whereas he previously had been satisfied with little more than half that amount. This dramatic increase in the production requirements, after the election, is a further demonstration of Hollander's efforts to retaliate against the employees for selecting the Union as their bargaining representative.

It is the totality of these circumstances that I find and conclude that the Respondent's claim of economic justification for the layoffs must be completely rejected. I further find that the motivating cause underlying the Respondent's conduct was the intense desire to retaliate against the employees for voting in favor of union representation and thereby discourage employee membership in the Union. *Battle Creek Steel Fabricating Company, Inc.*, 169 NLRB No. 125; *West Side Plymouth, Inc.*, 170 NLRB No. 98. The suddenness of the layoffs, the departure from the past practice of putting employees to work in other jobs when business was slack, the various statements made to employees after the election, and the imposition of oppressive production quotas are all factors which far outweigh the Respondent's claim of economic necessity in its treatment of the employees. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees and increasing the production of two employees for discriminatory reasons.

---

27. As the General Counsel correctly pointed out in his brief, "this mess before" obviously referred to the Union's prior attempt to organize the employees in 1964. A complaint was issued in connection with that effort and was subsequently dismissed by the Trial Examiner (TXD-378-65).

The discharge of Reagan and Sawmiller must also be considered as a part of the pattern of unlawful conduct directed at the employees by the Respondent. It is clear that Reagan was fired for discussing the Union on the job, but it is equally as clear that until this particular incident the Respondent never invoked or enforced a rule against discussions of the Union in the plant. Indeed, the evidence shows that the Respondent's president and supervisors repeatedly discussed the Union with employees while they were on the job, and that Burgher freely circulated among the employees while they were working in an effort to poll them about their union sympathies. The conversation between Ward and Reagan which precipitated the latter's discharge was in fact initiated by Ward, who was complaining about the fact that the majority of the employees voted in favor of the Union. Hollander summarily discharged Reagan without affording her an opportunity to explain or defend her conduct, and there is no evidence in this record that any other employee was ever discharged for discussing the Union while working. It is apparent, therefore, that the rule against discussing the Union while on the job, if it existed at all, was spontaneously invoked and discriminatorily enforced against Reagan. Consequently, her discharge was in violation of Section 8(a)(3) and (1) of the Act. *Talon, Inc.*, 170 NLRB No. 42; *Clanbach, Inc. d/b/a Carousel*, 170 NLRB No. 35. Cf. *Rexall Chemical Company, a Division of Rexall Drug and Chemical Company*, 172 NLRB No. 147.

The Respondent's claim that Sawmiller was discharged because of a policy against allowing female employees, for purposes of safety, to work in the plant is likewise without merit. The credible evidence indicates that at least one other female employee was allowed to work until she was in her 6th month of pregnancy. Moreover, Hollander's comments to Sawmiller at the time that she was ill, due to her pregnancy, gave rise to the expectation that the employee would be allowed to return to work once her condition was better. There was no mention of the alleged company policy against allowing pregnant women to

work in the plant. I find therefore that Hollander seized upon the fact of Sawmiller's pregnancy as a pretext to enable him to get rid of one more employee identified as a union supporter. I therefore find that by the discharge of Sawmiller, the Respondent further violated Section 8(a)(3) and (1) of the Act. *Jackson Packing Company,* 170 NLRB No. 155.

Conclusions of Law

1. The Respondent Tiidee Products, Inc., is an employer in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The above Union is the duly certified collective-bargaining representative of the Respondent's employees in the following appropriate unit:

> All production and maintenance employees at the Employer's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors, as defined in the Act.

4. By unlawfully interrogating employees to determine the identity of union adherents and the extent of union activity in the plant, the Respondent interfered with, coerced, and restrained employees in the exercise of their statutory rights and violated Section 8(a)(1) of the Act.

5. By threatening to close the plants in the event that the Union became the employees' bargaining representative, and by threatening to get rid of employees who supported the Union, the Respondent interfered with, restrained, and coerced the employees and violated Section 8(a)(1) of the Act.

6. By seeking to induce employees to act as informers concerning the union activities of fellow employees, the Respondent further violated Section 8(a)(1) of the Act.

7. By conducting a poll of the employees in order to determine their sentiment for or against the Union, at a time when a representation proceeding was pending before the Board, the Respondent further violated Section 8(a)(1) of the Act.

8. By unlawfully laying off employees because a majority of the employees selected the Union as their collective-bargaining representative, the Respondent violated Section 8(a)(3) and (1) of the Act.

9. By discriminatorily discharging employees in order to retaliate against employees for selecting the Union as their collective-bargaining representative and in order to discourage membership in the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

10. By arbitrarily increasing production quotas of employees in order to retaliate against them for selecting the Union as their collective bargaining representative, the Respondent changed terms and conditions of employment of its employees in order to discourage membership in the Union and violated Section 8(a)(3) and (1) of the Act.

11. By refusing to bargain with the Union as the certified collective-bargaining representative of the employees in an appropriate unit, the Respondent violated Section 8(a)(5) of the Act.

12. By refusing to furnish the Union with information pertaining to employees' existing wage and fringe benefits, the Respondent also violated Section 8(a)(5) and (1) of the Act.

13. By refusing to meet and negotiate with the Union, as the duly certified representative of its employees, until all litigation was concluded, the Respondent further violated Section 8(a)(5) and (1) of the Act.

14. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section

8(a)(1), (3) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that the Respondent discriminatorily laid off and discharged employees on various dates, beginning September 15, 1967, I shall recommend that the Respondent recall all employees discriminatorily laid off and reinstate all employees discriminatorily discharged to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. The sum payable to these employees shall equal the amount they would have earned from the date of their unlawful layoff or discharge, as the case may be, to the date of recall or the offer of reinstatement, less any net earnings during the said period. Backpay shall be computed on a quarterly basis in a manner consistent with the Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, and interest thereon shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. In the case of employee Sawmiller, however, backpay shall not accrue from the 6th month of her pregnancy to the time that she would have normally been able to return to work after the termination of her pregnancy.

Because the Respondent has refused and continues to refuse to bargain with the Union as the duly certified collective-bargaining representative of its employees in the unit found appropriate, I shall further recommend that it cease and desist from refusing to bargain, and, upon request, bargain in good faith with the Union. Further, that if an understanding is reached, embody such understanding in a signed agreement. In view of the nature of the Respondent's extensive unfair labor practices and because this conduct evinces a complete rejection of the collective bargaining principle, I shall also recommend that the certification period be extended to begin on the day that the Respondent commences to bargain in good faith with the Union, upon request, as

the certified bargaining representative. *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F. 2d 600 (C. A. 5); *Excelsior Laundry*, 167 NLRB No. 64; *Monroe Manufacturing Company*, 167 NLRB No. 157.

In addition to the above, the Union seeks a far broader remedy. The Union requests that the Respondent make the employees whole for wages and benefits which they might have received but for the Respondent's unlawful refusal to bargain, and that the Respondent be required to pay the Union the amount of dues and initiation fees it lost dating from 130 days after the Union was certified. The 130 days is predicated upon the testimony of high-ranking union officials that in their experience a contract containing a union-shop clause is generally executed within 100 days after certification. The Union's request for this type of an expanded remedy represents the views of a growing body of respectable authority who take the position that the Board's current policy and practices in remedying this type of unlawful refusal to bargain is neither adequate nor realistic. There is curently pending before the Board at the present time two cases in which such a request is being considered.[28] In each of these cases the Board has received oral argument on the question of an adequate remedy, but has not, as yet, rendered its decision. As the remedy requested in the instant cases involves both legal and policy questions which should be initially considered by the Board, I am not inclined to grant the remedy requested by the Union. In the course of the trial of these cases, I allowed the Union to develop fully in the record all evidence necessary to sustain its position on this issue and in the event that the Board does modify its policy in this regard, the Union's position is amply protected. Accordingly, I decline to require the Respondent to make the employees

28. *Zinke's Foods*, Case 30-CA-372 (TXD-662-66, Trial Examiner Josephine Klein); *Ex-Cell-O Corp.*, Case 25-CA-2377 (TXD-80-67, Trial Examiner Osley Vose).

whole for wages and benefits that might have been negotiated but for the unfair labor practices, and I likewise decline to require the Respondent to pay the Union the amount of dues and initiation fees lost as a result of failure to negotiate a collective-bargaining agreement. *Monroe Auto Equipment Company, Hartwell Division,* 164 NLRB No. 144. Cf. *Excelsior Laundry, supra.*

Because of the nature and extent of the unfair labor practices found herein and because these violations manifest an attitude of hostility directed toward the very basic purposes of the Act, and further, in order to prevent the commission of other unfair labor practices by the Respondent, I shall recommend a broad cease-and-desist order. *Barnwell Garment Company, Inc.,* 163 NLRB No. 8; *N. L. R. B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532, 536 (C. A. 4).

Accordingly, upon the foregoing findings of fact and the conclusions of law and upon the entire record in this case, I recommend, pursuant to Section 10(c) of the Act, the following:

RECOMMENDED ORDER

Respondent Tiidee Products, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees to determine the identity of union supporters and the extent of union activity in the plant.

(b) Threatening to close the plant or to discharge employees who support the Union in the event that the Union became the collective-bargaining representative.

(c) Seeking to induce employees to act as informers in an effort to determine the extent of union activities of other employees in the plant.

(d) Unlawfully polling employees to determine whether or not they support the Union.

(e) Discriminatorily laying off employees because the majority of the employees selected the Union as their collective-bargaining representative.

(f) Discriminatorily discharging employees because the majority of the employees selected the Union as their bargaining representative and because the employees so laid off were supporters of the Union.

(g) Discriminatorily changing terms and conditions of employment in order to retaliate against employees for voting in favor of union representation, and to discourage membership in the Union.

(h) Refusing to bargain collectively with International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the duly certified exclusive bargaining representative of its employees concerning wages, rates of pay, hours, and other terms and conditions of employment in the following appropriate unit:

> All production and maintenance employees at the Respondent's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

(i) Refusing to furnish the Union with requested information necessary to enable the Union to act fully in its capacity as the collective-bargaining representative of the employees in the above unit.

(j) Refusing to meet and negotiate with the Union, as the duly certified representative of the employees, until all pending litigation is finally disposed of.

(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the duly certified collective-bargaining representative of its employees in the appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Furnish the Union with the requested information pertaining to wage and fringe benefits currently received by the employees in the bargaining unit.

(c) Recall any employee currently in layoff status, found herein to have been discriminatorily laid off, to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed by them, and make them whole for any loss of pay suffered by reason of their discriminatory layoffs in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Offer Wanda Reagan and Virginia Sawmiller immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and priviliges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(f) Notify the employees laid off, if any are presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and

Service Act, as amended, after discharge from the Armed Forces.

(g) Post at its Dayton, Ohio, plant copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's official representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(h) Notify the Regional Director for Region 9, in writing 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[30]

Dated at Washington, D. C. August 28, 1968.

Certified True Copy

O. W. FIELDS

Executive Secretary of NLRB

Date August 28, 1968

29. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

30. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

TXD-486-68

APPENDIX

Notice to all Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

THIS NOTICE IS POSTED PURSUANT TO A RECOMMENDED ORDER OF THE TRIAL EXAMINER ISSUED AFTER A TRIAL IN WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE TRIAL EXAMINER FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

The Act gives all employees these rights:

To organize themselves

To form, join or help unions

To bargain as a group through a representative of their own choosing.

To act together for collective bargaining or other mutual aid or protection

To refuse to do any and all of these things

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten our employees with plant closures, or discharge, or with any other types of reprisals because they have selected International Union of Electrical, Radio and Machine Workers, AFL-CIO, as their exclusive bargaining representative.

WE WILL NOT attempt to get employees to inform on the union activities and desires of their fellow employees.

WE WILL NOT unlawfully interrogate employees concerning their union membership, activities, or desires, nor will we unlawfully poll our employees in order to discover their sentiments about the Union.

WE WILL NOT lay off employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discharge employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discriminatorily change terms and conditions of employment because employees voted in favor of union representation, or in order to discourage membership in the Union.

WE WILL NOT refuse to bargain collectively with the above Union as the certified collective-bargaining representative of the employees in the following unit:

All production and maintenance employees at our Dayton, Ohio, plant excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with information that will enable it to function as the bargaining representative of our employees in the above unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole Virgina Sawmiller and Wanda Reagan for any loss of earnings they may have suffered by reason of their discriminatory discharges.

WE WILL recall and make whole all employees who were discriminatorily laid off by us.

WE WILL notify any of our employees if currently in layoff status and if presently serving in the Armed Forces of the United States of their rights to full reinstatement upon application in

accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL bargain collectively with the above Union as the duly certified collective-bargaining representative of our employees in the above unit and if an understanding is reached, we will sign a contract with the Union.

TIDEE PRODUCTS, INC.
(Employer)

Dated ..... By .....
(Represenative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 684-3686.

174 NLRB No. 103
[24]

D-1674
Dayton, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIIDEE PRODUCTS, INC., and INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO-CLC.[1]	Cases 9-CA-4440, 9-CA-4488, 9-CA-4536, 9-CA-4563

DECISION AND ORDER

On August 28, 1968, Trial Examiner Gordon J. Myatt issued his Decision in the above-entitled cases, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Union and the Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the find-

1. The Union has requested that the initials "CLC" be included in the designation of its affiliation. In the absence of objections, we grant its request.

ings, conclusions, and recommendations of the Trial Examiner,[2] as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent Tiidee Products, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.

Dated, Washington, D. C., Feb. 24, 1969.

FRANK W. MCCULLOCH,
Chairman

GERALD A. BROWN,
Member

HOWARD JENKINS, JR.,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

2. The Respondent filed a motion to reopen and consolidate these cases with Cases 9-CA-4618, 9-CA-4639-2, and 9-CA-4710. We have considered the Respondent's motion and, finding no merit therein, hereby deny it. As for the Respondent's contention of bias and prejudice on the part of the Trial Examiner, we have reviewed the record and find the contention without merit.

We find it unnecessary to pass upon the Charging Party's request that we make certain additional 8(a)(1) findings. Such findings, if made, would be cumulative in nature and would not affect the scope of our Order and Remedy herein because we have already provided a broad cease and desist order protecting all of the employees' Section 7 rights.

3. The capitalized second paragraph of the "Appendix" attached to the Trial Examiner's Decision and Recommended Order is hereby amended to read as follows: THIS NOTICE IS POSTED PURSUANT TO AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD ISSUE AFTER A TRIAL IN WHICH BOTH SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENTS. THE BOARD FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

TXD-164-69
Dayton, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners

TIIDEE PRODUCTS, INC. and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO.	Cases 9-CA-4618 9-CA-4639-2 9-CA-4710

Stephen S. Frockt, Esq., of Cincinnati, Ohio, for the General Counsel

Mr. Harvey B. Rector (Rector & Associates) of North Lawrence, Ohio, for the Respondent.

Ronald H. Janetzke, Esq., of Kettering, Ohio, and *Mr. Charles D. Burton*, of Dayton, Ohio, for the Charging Union.

TRIAL EXAMINER'S DECISION

Statement of the Case

William W. Kapell, Trial Examiner: Cases 9-CA-4618, 9-CA-4639-2, and 9-CA-4710, proceedings under Section 10(b) of the National Labor Relations Act, as amended, herein called

the Act, were heard in Dayton, Ohio, on September 18 and 19, 1968,[1] with all parties participating pursuant to due notice.

The Complaint[2] in Case 9-CA-4618 alleges that Tiidee Products, Inc., hereafter referred to as Respondent, during the latter part of January instituted plant rules threatening discharge of employees for talking about the union during "company time" or for distributing literature on "company property," thereby unlawfully limiting union soliciting of employees in violation of Section 8(a)(1) of the Act; and unilaterally changed the terms and conditions of employment by publishing and instituting new rules of employment in a unit of employees for which the Union is the exclusive bargaining representative, in violation of Section 8(a)(5) of the Act.

The Complaint in Case 9-CA-4639-2 alleges that Respondent constructively discharged employee John Haywood and refused to reinstate him in violation of Section 8(a)(1), (3), and (4) of the Act because of his union support and his adverse testimony to Respondent's interests in a prior Board hearing.

The complaint[4] in Case 9-CA-4710 alleges that in violation of Section 8(a)(1) of the Act, Respondent interfered with, restrained, and coerced employees by admonishing them not to associate with union sympathizers and stating that union adherents were troublemakers, unliked by Respondent, that they would soon find out to whom to talk, and that involvement with union activity would be harmful; that in violation of Section 8(a)(3) and (1) of the Act, employees David Leffler and Pauline Messer were discriminatorily discharged because of their

1. All dates hereafter refer to the year 1968 unless otherwise noted.

1. All dates hereafter refer to the year 1968 unless otherwise noted.

2. Based on charges filed on February 7 and March 7 and 28, respectively, by International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereafter referred to as the Union.

3. Based on charges filed on April 26 and 27, respectively, by the Union.

union support; that employee Claudine Tackett was discriminatorily discharged because of her union support and adverse testimony in a prior Board hearing in violation of Section 8(a)(3), (4), and (1) of the Act; that employee Phyllis Wilson was constructively discharged or, in the alternative, discharged because of her union support and adverse testimony in a prior Board hearing in violation of Section 8(a)(3), (4) and (1) of the Act; and that the terms and conditions of employment were changed by unilaterally instituting new work rules and issuing written warnings to employees for alleged infractions of said rules, unilaterally adopting a 90 day probationary period for new employees, and not permitting an employee to be represented by a union agent with respect to a grievance concerning a condition of employment, in violation of Section 8(a)(3), (5) and (1) of the Act. Respondent duly filed an answer to each complaint denying the commission of any of the alleged violations. By order of July 19, the Regional Director for Region 9 of the National Labor Relations Board, hereafter referred to as the Board, consolidated the aforedescribed cases for purpose of hearing.

All parties were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. General Counsel, the Charging Union, and Respondent filed briefs which have been duly considered. On the entire record in the cases, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Commerce

Respondent, an Ohio corporation engaged in the manufacture of metal products at its plant in Dayton, Ohio, had a direct outflow during the past 12 months in interstate commerce of goods and products valued in excess of $50,000, which it sold and shipped from its Dayton plant directly to plants outside of

Ohio. Respondent admits, and I find, that at all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Prior Board Proceedings*

Pursuant to several charges[5] filed against Respondent by the Union during September, October and November 1967, alleging violations of Section 8(a)(1), (3), and (5) of the Act, a hearing was held before a Trial Examiner of the Board during January 1968. On August 27, the Trial Examiner issued a decision in which he found, *inter alia* that Respondent (1) violated Section 8(a)(5) for its refusal to recognize and bargain with the Union as the exclusive bargaining representative of an appropriate unit of Respondent's production and maintenance employees pursuant to a certification[6] issued by the Regional Director for Region 9 on November 8, 1967, following a Board-conducted representation election on September 14, 1967; (2) violated Section 8(a)(1) by interfering with, coercing, and restraining its employees in a widespread manner in the exercise of rights guaranteed in Section 7 of the Act; and (3) violated Section 8(a)(3) by arbitrarily raising production quotas of employees and discriminatorily laying off and discharging employees in retaliation for the support of the Union. The Trial Examiner's findings, conclusions, and Recommended Order providing appropriate relief were adopted by the Board on February 24, 1969,[7] with slight modification not pertinent herein.

5. Cases 9-CA-4440, 9-CA-4488, 9-CA-4536, and 9-CA-4563.
6. Challenged by Respondent but upheld by the Trial Examiner.
7. 174 NLRB No. 103.

B. *The Alleged 8(a)(1) Violations*

1. The posted rules

It was stipulated that in January following the prior Board hearing (January 16-18), Respondent posted a set of work rules and regulations containing, *inter alia*, the following:

> 5. Soliciting or collecting contributions for any purpose whatsoever, on company premises, without the approval of the management.
>
> 9. Distribution of literature, written or printed matter of any description on company property, not incidental to company business.

The rules and regulations state further that an employee committing minor offenses shall be warned, that two such infractions shall constitute a major offense subjecting an employee to a 3-day layoff, and that two major infractions constitute an intolerable offense for which an employee is subject to dismissal.

Irvin Hollander, Respondent's president, testified that posted rules had been in effect since 1945, that due to a fire 2 years ago the posting was destroyed and he had neglected to replace it, and that they were reposted following the prior Board hearing because the employees began to neglect their work. He testified further that prior to the fire only part of the rules were posted on a small 3 by 5 card. The current posting contains 34 rules and regulations in addition to other typed matter and is 8 by 11 inches in size. No evidence, however was presented to show which, if any, of the rules were allegedly previously posted.

Conclusions

Regardless of prior postings of the rules, the non-solicitation rule is invalid and in violation of Section 8(a)(1) of the Act. The rule applies to employees on their own time as well as to

working time.[8] Moreover, it was posted not long after the Union won a representation election, and closely following the Board hearing at which several of Respondent's employees testified adversely to its interest. It appears, and I find, that Respondent was motivated to post the rules in retaliation against employees for their union support.[9] See *Marlene Industries Corp.*, 166 NLRB No. 58; and *Wm. H. Block Company*, 150 NLRB 341.

The nondistribution rule is presumptively violative of Section 8(a)(1) unless rebutted by evidence of special circumstances demonstrating its need based upon safety factors, interference with plant production or plant discipline. No such showing was established herein.[10] I, therefore, find that the nondistribution rule was also violative of Section 8(a)(1).[11] The threat to impose disciplinary measures for infractions of the posted proscriptions served to aggravate the interference with the rights and coercion of the employees.

2. The alleged threats to, and unlawful interrogation of, Wells

About 3 weeks after the prior Board hearing, Hollander, in a conversation with employee Bill Wells at his work station concerning his salary and the type of work he is qualified to perform, stated "* * * because when you cut my throat you're cutting your own throat." About a week after the foregoing conversation, Hollander summoned Wells to his office and

8. Any ambiguity in the scope of these rules is held against the promulgator rather than against the employees. *N. L. R. B.* v. *Miller Charles & Co.*, 341 F. 2d 870, 874 (C. A. 2), enfg. 148 NLRB 1579; Campbell Soup Company, 159 NLRB 704, enfd. 380 F. 2d 372 (C. A. 5).

9. In the prior cases, Respondent was also found to have unlawfully retaliated against employees for their union support.

10. See *Republic Aviation Corporation* v. *N. L. R. B.*, 324 U. S. 793, 797-798.

11. The posting without consultation or negotiation with the Union is discussed, *infra*, as a violation of Section 8(a)(5).

accused him of having made inconsistent statements in his testimony at the prior Board hearing, and also interrogated him as to what he had discussed with the General Counsel and union counsel during that hearing.

On April 10. Wels was given a warning notice[12] pursuant to the posted rules because he allegedly failed to watch the work of a new employee, as directed, with the result that she turned out defective parts. Wells, however, testified that her work satisfactorily performed while he was in a position to observe it but that inasmuch as he also had to attend to the operation of his own machine he was unable to check on all her work. His testimony was not refuted, nor was any evidence presented to indicate either in what manner or to what extent the new employee turned out defective work.[13]

Conclusions

The General Counsel asserts that Hollander's "throat cutting" remark constituted a threat directed against Wells for his union activities, and that his interrogation of Wells interfered with his statutory rights in violation of Section 8(a)(1). I find that, although the "throat cutting" remark of Hollander raises a suspicion that it was related to Wells' union activity, the evidence reflects no reference to unionism or union activities during this conversation, and appears only to concern Wells' gripe that he was relegated to low-paying relatively unskilled jobs despite his ability to perform higher remunerative work. I conclude that the General Counsel has failed to establish by the preponderance of the evidence that this incident constituted a threat to Wells to abstain from union activity in violation of Section 8(a)(1) of the Act. I find, however, that Hollander's interrogation of Wells concerning his conversation with the General Counsel

12. The notice had notations of defective work and carelessness, and failure to perform work as directed.

13. The effect of the warning notice as a violation of the Act is discussed, *infra.*

and union counsel during the prior Board hearing constituted unlawful interrogation. Such interrogation can be reasonably equated with that regarding the contents of affidavits given to Board agents by employees, which under well-settled Board law has been found violative of Section 8(a)(1) of the Act.

3. The alleged coercion of Pauline Messer and David Leffler

The uncontradicted evidence shows that on March 27, Hollander hired Pauline Messer as a 90-day probationary employee and, at that time, told her "* * * we have quite a few troublemakers here, and we do not like troublemakers," and that she should learn to whom she should talk and to whom not to talk. Messer admittedly did not comprehend the significance of these remarks at the time. It also appears that similar remarks were addressed to Messer by Supervisor Mary Burgher and Hazel Ward.[14] However, Messer testified that neither Ward nor Burgher ever mentioned the Union to her in these conversations. Nor is there any evidence that Hollander referred to the Union in his comments to her when hired or at any other time.

On April 12, Hollander, in a conversation with David Leffler who began working for Respondent about the middle of March, inquired whether he was becoming intimate with some of the employees, mentioning specifically the names of Messer and Phyllis Wilson. Leffler replied that he had not but stated that he had a date with Messer for that evening. Hollander then told him to be careful with whom he associated or talked to because he could get into big trouble. The next morning, Saturday, a nonworkday, Leffler was summoned to the plant by Hollander who questioned him about his date of the preceding evening and then asked whether he realized what was meant by his remark of the preceding evening in connection with

14. A pro-company employee who testified on behalf of Respondent in the prior Board hearing as well as in the instant case.

associating with the wrong people. When Leffler replied that he thought he meant "union sympathizers," Hollander denied it and stated he was referring to improper social relations between the women and men employees, which could subject the men to blackmail.[15]

Conclusions

The General Counsel contends that through knowledge subsequently acquired by Messer while working on the job, she learned that the term "troublemaker" was synonymous with the term "union adherent," and that, therefore, Hollander's comment to her when hired was coercive in violation of Section 8(a)(1) of the Act.

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7. It is well settled that the test of interference, restraint, and coercion is whether the conduct involved may reasonably be said to tend in those directions. *Kroger and Company* v. *N. L. R. B.*, 401 F. 2d 682, 686 (C. A. 6). I find that the record fails to establish by the preponderance of the evidence that Messer, during the course of her employment eventually comprehends the significance of Hollander's remark to mean that she was not to associate with union adherents. I, accordingly, conclude that Hollander's alleged admonition to Messer did not tend, insofar as she was concerned, to interfere with her statutory rights in violation of Section 8(a)(1).

The General Counsel contends that Hollander's remarks to Leffler were also directed against his association with union adherents, and, therefore, coercively similar to his remarks to Messer. It appears, and I find, that Leffler, in contrast to

15. A few of the women employees, including Messer, were either separated from their husbands or divorced. Leffler was also either separated from his wife or divorced.

Messer's possible lack of sophistication, believed that Hollander was referring to union adherents. I am not persuaded by Hollander's belated explanation to Leffler that he was not referring to union adherents, and his expressed concern for the morals of his employees in their personal relations away from the plant. In these circumstances I find that Hollander's statements to Leffler may reasonably be found to have tended to interfere with or coerce him within the meaning of Section 8(a)(1) of the Act.

C. The Alleged Violations of Section 8(a)(3) and (4)

1. The discriminatory discharges

a. *John Haywood*

Haywood, an ex-convict under the supervision of Parole Officer John Weiher, began working for Respondent on March 15, 1967. In June of that year, Hollander in a conversation with Weiher praised Haywood as a good worker. During November of that year Weiher received a call from Hollander complaining about his work. On November 20, Weiher visited Haywood at his home and informed him that he had received a telephone call from Hollander to the effect that he had become too involved in union problems.[16] On March 7, Weiher received another call from Hollander complaining about Haywood's conduct at the plant in using foul language which would not be tolerated because of the women employed there.[17] That night Weiher visited Haywood at his home and advised him that Hollander wanted him to quit because his work was poor and he had lied about Hollander at the prior Board hearing.

16. In the preceding Board cases it was found that during the union campaign Hollander used Haywood to ferret out information about union adherents, but that Haywood later refused to sign a company-sponsored petition circulated among the employees to indicate whether or not they were in favor of the Union.

17. Haywood testified without contradiction that he had never been warned about using foul language in the plant.

Weiher urged him to quit but Haywood was reluctant to do so because he lacked 1 week's work to qualify for a week's vacation with pay. He, however, agreed to follow Weiher's advice if he were permitted to work 1 more week to qualify for the paid vacation. Weiher stated that he would take it up with Hollander the next day. The following afternoon Weiher called Hollander and after discussing Haywood's proposal, Haywood was called to the telephone and told by Weiher that Hollander was willing to give him the week's vacation pay if he quit then and there. Weiher also advised him that otherwise he was "afraid Mr. Hollander would write to Columbus [Ohio] and might cause you a lot of trouble later." Haywood then related to Hollander that Weiher advised him to quit to which Hollander replied, "Well, he's your boss; you ought to do what he says." Haywood agreed to leave, and upon receiving his paycheck from Hollander was told "you can call it a vacation check or a separation check.[18]

Adam Campbell, an employee, testified that at the end of November 1967, he had a long conversation with Haywood about the latter's immoral exploits with women, and that on January 8, he had another conversation lasting 3 to 4 hours during which Haywood neglected to remove certain castings from his machine, causing them to get scratched. Campbell also testified that he complained to Hollander that Haywood's long conversation with him interfered with his work. Haywood denied engaging in such conversations.

Conclusions

General Counsel contends that Haywood was constructively discharged in violation of Section 8(a)(3) and (4) of the Act. Respondent asserts that Haywood resigned on the advice of his

18. The above findings are based upon the credited composite testimony of Haywood and Weiher. Although Hollander testified he made no reference to the matter.

parole officer. It appears that Haywood had testified[19] on behalf of the General Counsel in the prior Board hearing, and had been unlawfully laid off in December 1967 in retaliation for his support of the Union.[20] Hollander continued to show his opposition to and displeasure with union adherents when he complained to Weiher that Haywood was becoming too involved in union problems. Realizing the vulnerability of Haywood's position because he was on probation, Weiher advised him to quit otherwise Hollander could do him great harm by complaining to the (parole authorities in Columbus Ohio). Under these circumstances, Haywood was pressured into resigning because he had no alternative but to follow his parole officer's advice. I find that Hollander was motivated in applying this pressure by reason of his opposition to the Union and desire to retaliate against union adherents. I find further that the complaints against Haywood grounded on his profanity at the plant and his failure to diligently apply himself to his regular work tasks were pretextual and intended to mask Respondent's union animus. I conclude that Haywood's quit was induced by Respondent's discriminatory action against him and he was therefore constructively discharged in violation of Section 8(a)(3) and (4) of the Act.

b. *David Leffler*

Leffler began working for Respondent in March, operating a sander and finishing mill. According to Hollander's son, Joseph, he had taught Leffler how to operate his finishing machine and had instructed him not to load it with castings for

19. It was stipulated that the alleged discrimination herein who testified at the prior Board hearing did so adversely to Respondent.

20. It was also found in the prior cases that when Haywood called for his check following that layoff, Hollander asked how he had voted in the election. After Haywood answered that he voted for the Union, Hollander stated that he knew it but was merely checking to ascertain what he would say.

polishing if he was going to quit for the day before the polishing was completed, and instead to work on sand jacks until quitting time. Otherwise, a lubricating detergent would not be added to the machine every 15 minutes, as required, and the castings would get scratched.

As related and found above Hollander asked Leffler, on April 12, whether was was getting friendly with the employees, mentioning, in particular, Pauline Messer and Phyllis Wilson,[21] which could get him in trouble, and that he should be careful with whom he spoke, to which Leffler replied that he was having a date that evening with Pauline Messer. In that conversation Hollander also complimented him on his work and said he expected him to work there for a long time.

Joseph Hollander testified that on the night of April 12, after Leffler had left the plant, he found his machine running, loaded with castings which had been damaged, and that he had advised his father that night of the incident.[22] The following morning (Saturday, a nonworking day) Leffler was summoned to the plant from his home. After questioning him about his date with Messer and referring to his conversation of the preceding day, as related above, Hollander told him that his work was not efficient, that on the preceding night at quitting time he had left castings on his machine, causing them to be scratched, and that he would have to let him go. Leffler claimed that he had been advised previously by Hollander that he could leave the castings in the finishing mill when he quit for the day, and that Adam Campbell, who was working overtime, would remove the castings when finished, which took from 20 to 30 minutes. Hollander did not refute this claim, nor was there any denial of Leffler's assertion that this procedure had been previously recommended by Hollander, his son Larry,

21. An avowed union adherent who had testified against Respondent at the prior hearing.

22. He also testified that he had informed his father 2 weeks earlier that Leffler could not take instructions and was not working out.

and Adam Campbell. Haywood also testified without contradiction that he not only never received such instructions as were allegedly given by Joseph Hollander to Leffler, but asserted that he was told to reload the polishing machine even when the castings would not be completed before his quitting time for the day because in that event the machine would be unloaded by one of the night men or Hollander.

Conclusions

Hollander's expressed concern and preoccupation as the guardian of the morals of his employees appears suspiciously pretextual as an attempt to immunize his new employees from contact with older employees who were known union adherents. His interrogation of Leffler on Saturday morning regarding his date with Messer, and his belated explanation that he was referring to immoral women employees rather than to union sympathizers, as understood by Leffler, was an attempt to dissipate any claim of anti-union motivation in preparation for Leffler's discharge immediately thereafter. Nor was there any reason or need to refer to the morality of the employees, if Leffler was being discharged because of his inability to perform his job properly. Furthermore, I find the evidence far from persuasive to establish that Leffler was disregarding instructions in the operation of the milling machine, which was asserted as the motivating cause for his discharge. Oddly enough, no evidence was presented to show the extent of the damage to the scratched castings, which would indicate the gravity of the single alleged incident as warranting such drastic action as a discharge, especially in view of the fact that on the preceding day Hollander had complimented his work. Considering all the evidence in the context of Respondent's antiunion propensity as found in the prior cases, I conclude that Leffler's discharge was, at least in part, motivated by Respondent's desire to discourage unionism in the plant in violation of Section 8(a)(3) and (1) of the Act.

c. *Pauline Messer*

Messer was hired by Hollander on March 27 as a 90-day probationary employee to work on the moulding machine. As related above, Hollander told her at that time that they had quite a few troublemakers and that she should learn with whom to associate. During her first week Hollander informed her that he had received a favorable report about her ability to learn and work from Hazel Ward who was breaking her in. During lunchtime on April 1, as she passed by the table occupied by Supervisor Mary Burgher, she was invited to sit down with her. Messer declined stating that she was going to sit with Phyllis Wilson, an active prounion employee. Shortly after lunch Hazel Ward, accompanied by Burgher, approached Messer at her machine and cautioned her about with whom she should associate. On April 15, Messer signed a union authorization card at the request of employee Claudine Tackett. On April 17, Ward came to Messer's machine and observed her work all day long, which had not occurred previously. The next day (Thursday) Union Attorney Janetzke telephoned Hollander about mid-morning and informed him that Messer had signed a union card. Later that afternoon Hollander approached Messer, handed her a paycheck and stated that he had been watching her and her attitude towards her work and did not think she was going to make it. Messer pointed out without avail that she had been hired as a 90-day probationary employee. Although her normal workweek was Monday through Friday, she was discharged on that Thursday and paid for 4 days.

Ward testified on behalf of Respondent that for the first week or two she trained Messer on her moulding machine and she caught on quickly and was a good worker. Thereafter, she began to take long coffeebreaks and to carry coffee to the men, as a result of which her production fell off because she was not at her machine to unload and reload when necessary. She reported this to Hollander, but said nothing to Messer.

Messer denied taking long coffeebreaks, and stated, without contradiction, that she had never received any warning about her work. Based on the demeanor of the witnesses and the sequence of events precipitating her discharge, Messer's testimony is credited.

Conclusions

The General Counsel submits that Messer was discriminatorily discharged because of her union support and to discourage unionism in the plant. Respondent contends that she was terminated because she failed to attend diligently to her machine causing her production to fall, and she had participated in the removal of a protective curtain hung between her machine and the one operated by Phyllis Wilson, which caused extensive damage to Wilson's machine.[23] I find it highly significant that there is no evidence indicating that Messer was ever reprimanded for her alleged shortcomings, that she was praised for her learning ability and work not long before she was fired, that within hours after Hollander was informed that she had joined the Union she was discharged, and that there was no immediate precipitating incident which necessitated or warranted her discharge a day prior to the ending of her normal workweek. These considerations viewed in the light of Respondent's antiunionism confirm the conviction that her discharge was motivated by antiunionism and retaliation against a union adherent in violation of Section 8(a)(3) and (1) of the Act.

d. *Claudine Tackett*

Tackett began working for Respondent in January 1967. As found in the prior case, she had been the chief union protagonist in the organizing campaign during 1967, had

23. The curtain was hung to deflect plastic particles emanating from Messer's machine from penetrating Wilson's machine. There is conflicting testimony as to whether the curtain had been partially opened or removed prior to Messer's hiring. However, I find for purposes of adjudicating her discharge that it is necessary to resolve whether or not she was involved in the alleged curtain incident.

served as the Union's observer at the representation election, and had testified adversely to Respondent at the prior hearing.[24]

On March 12, Tackett was recalled from layoff status by Hollander. Before she began working, Hollander warned her that he was tired of her bad work and she was not to cause any more trouble.[25] He also changed her work procedures by restricting her to her work area, her boxes were to be brought to her and later removed to the shipping area, she was not to seal her boxes, Hollander was to inspect her work, and she no longer was to keep a record of her production, all of which she had personally done previously. And, whereas before she used to cut and wind five boxes of plastic water hoses and then place couplings on them, henceforth she would complete one box at a time.[26] On March 13, Hollander had her read the posted work rules and directed her to increase her production to 27 boxes a day, although previously she had produced 12 or 13 boxes a day and had not been pressured to augment her production.[27] During that week, Hollander also reprimanded her for quitting at 4:25 p.m. instead of 4:30 p.m., despite the established practice of the employees to stop working at 4:25 p.m. to wash up before leaving.

---

24. The findings in those cases also show that Hollander visited Tackett at her home during August 1967 while she was convalescing from her foot injury and gave her $50. At that time, apparently unbeknown to Hollander, she was acting as liaison between the Union and the employees. Immediately following the announcement of the election returns on September 14, Hollander turned to her and accused her of ungratefulness after all he had done for her. The morning following the election Tackett was the first employee laid off allegedly for lacking work. She was recalled on September 25 for approximately 1 week and again laid off ostensibly for lack of work. Her layoffs were found to have been discriminatorily motivated because of her union support.

25. No evidence was presented to justify these complaints.

26. These procedural changes, however, were not applied to other employees as appears from the testimony of employee Jewel Romaine.

27. Although Jewel Romaine testified on behalf of Respondent that she produced from 45 to 50 boxes a day, sometimes only 35, Tackett's testimony as to her production prior to her recall was not refuted.

On March 20, Tackett received a warning notice[28] from Hollander for allegedly placing three couplings instead of two on a 15-foot water hose which had been found on top of one of her unsealed boxes. Tackett stated that she could not tell whether it was her doing or that of other employees who worked on hoses before she began such work on that day.[29] On April 17, Tackett received a second warning notice for allegedly packing 10-foot hoses in a box marked for 15-foot hoses, and was given a 3-day suspension. Tackett disclaimed responsibility for the error, claiming that it happened between the time she left the plant for the day and before she reported on the following morning. About 2 weeks later, Hollander accused her of being short in her count of hoses in one of her boxes, which she denied.

During April she worked alternately on the winder and drill machines. About April 30, Hollander assigned her to learn and work on the elbow machine,[30] despite her protestations that she was fearful of working on that machine. The morning after Tackett began working on the elbow machine, a new girl was hired to operate the drill doing the work previously done by her. Tackett operated the elbow machine for a day and a half and then asked Burgher to relieve her

28. The notice listed defective work and carelessness as infractions of the work rules, and stated that another infraction of a minor rule would subject her to a 3-day layoff.

29. Employee Romaine testified that it was virtually impossible for an operator not to detect so flagrant (an inspection of Respondent's Exhibit 1 confirm that impression), and Respondent's witness, Eleanor Kleismit, stated that it was the only such defect she had seen in 15 years.

30. This is a large machine which produces plastic elbows to fit on pipe in the plastic department. In its operation large pliers are used which require balancing on one foot and bracing the other foot against the machine. Although Respondent witnesses Connie McGoon, Barbara Tipton, and Mary Burgher testified that it was no harder to operate than other equipment, I find based on all the evidence that it was not only more cumbersome to operate but also required greater effort compared to a winder or drill.

for an hour because her foot hurt.[31] Burgher replied that she would have to consult Hollander. Not long after, Hollander appeared at the machine and told Tackett he would see about relieving her the following day because they had only 45 minutes left to quitting time. Tackett did not report for work the following day, but showed up on May 6, when she told Hollander she declined to work on the elbow machine because she was afraid he would not relieve her in the event she became sick, and she was also afraid of what he might do to the machine to mess up her work in order to fire her. Hollander replied that he had nothing else for her to do and told her to wait for him in the lunchroom. Shortly thereafter, he appeared in the lunchroom and advised her that he had no other work for her and would call her when it became available. At that time there was practically no 10 or 15 foot hoses in stock, and there were outstanding orders for these products.

Not hearing from Hollander, Tackett and her father appeared at the plant on May 16. Her father went into the office while she remained outside and he demanded her paycheck from the office girl. Hollander was summoned and ordered him out of the plant. He then asked Tackett, who appeared in the doorway, why she had not been in or called in and if she had quit. When she denied quitting, he asked her to wait a minute and went into his office and reappeared with a notice[32] which he gave her, and stated "Now, you are fired."[33]

---

31. She had sustained injuries to her foot the preceding August in an automobile accident, which incapacitated her some time and of which Hollander was aware.

32. The notice, dated May 5, was designated "3rd Notice" and stated "Violation No. 6 Gross insubordination. Refused to operate a machine you were assigned to."

33. The above findings are based on the credited testimony of Marjorie Pratt, the office girl who witnessed the confrontation and testified on behalf of Respondent. Tackett's testimony of the incident differed in that she stated Hollander told her that she had quit and she denied it. According to Hollander, he asked Tackett where she had been, and when she replied that he had told her he would call her, he accused her of lying and gave her the discharge ticket because she refused to run the elbow machine. Tackett's testimony to the effect that she denied quitting is credited.

Conclusions

The evidence clearly establishes that beginning with March 12 when Tackett was recalled to work, Hollander resumed his harassment of her by warning her about her future conduct in the plant. It would also be reasonable to assume that Hollander was particularly incensed at her at that time because of his feeling that she had deceived him in supporting the Union and was regarded as ungrateful. He continued to harass her as is shown by his change of her work procedures, raising her production quota, taking her off the drill machine and hiring a new employee to operate that machine, assigning her to work on the elbow machine despite her protestations, and laying her off when she declined to work on the elbow machine, allegedly because there was no other work available despite a shortage of inventory.[34] It also appears that in the first two warning notices issued to Tackett she was held responsible for alleged carelessness and defective work in circumstances where there was reasonable doubt as to her blame. Also, although Respondent claims that Tackett was discharged for her refusal to work on the elbow machine, it appears that she was only laid off at the time of her refusal. The discharge was a later development.

Based on the foregoing, I conclude that Hollander was motivated to discharge Tackett on May 16 because of his desire to retaliate against her for her union support in violation of Section 8(a)(3), (4), and (1) of the Act.

e. *Phyllis Wilson*

Wilson began working for Respondent on November 22, 1966. As found in the prior cases, she was discriminatorily laid off in September and October 1967, but had been recalled before the prior Board hearing at which she testified adversely to Respond-

34. As appears above in the prior cases, Respondent was also found to have discriminatorily laid her off, allegedly for lack of work.

ent.[35] She had worked primarily on the assembly table before that hearing, and at no time had she operated the drill, the moulding machine, or the elbow machine. A few weeks after that hearing she was transferred to work on the elbow machine when Connie McGoon, who operated that machine, became ill. Upon McGoon's return to work, she alternated with Wilson in operating the elbow machine, each working half a day for the next few weeks until McGoon hurt her finger. Wilson then ran the elbow machine all day for the following month. She then complained to Supervisor Burgher about why she was not relieved by McGoon. Burgher replied that she did not know and that if she had any complaints to take them directly to Hollander.[36]

Wilson decided that she would not continue working on the elbow machine unless she obtained relief and did not report for work on Monday, April 15. She called Mr. Janetzke, the union attorney, and explained her predicament to him. He suggested that she see Hollander about obtaining relief but she declined to go alone. He then asked whether she would see Hollander accompanied by Creola Reese, the union representative, to which she agreed. The following day she and Reese visited the plant where Reese explained to Hollander that she was there on behalf of Wilson's request for relief on the elbow machine. Hollander refused to discuss the matter and told her to see Harvey Rector, his representative, if it concerned any employee or union matter. Harsh words were then exchanged between them, and Reese, if not both of them, was ordered to leave the plant. Reese and Wilson then went to see Janetzke who called Rector and, after referring to and relating the Reese-Hollander incident, he discussed the failure to relieve Wilson on the elbow

35. A week after the election Hollander warned Wilson "to watch her step and her mouth."

36. By that time McGoon had recovered sufficiently from her finger injury to relieve Wilson during her 1-minute mid-morning and afternoon coffeebreaks.

machine as was the practice with other female operators.[37] Rector replied that Wilson had indicated animus towards Hollander by her testimony at the prior hearing. Janetzke admitted that there were hard feelings between them, and asked Rector to intercede on her behalf with Hollander in resolving the matter. Rector agreed to do so, and later that day he called Janetzke and informed him that he had spoken to Hollander who insisted that if Wilson wished to continue working, she would have to do so under the conditions assigned by him.

On April 19, Wilson and her husband visited the plant to pick up her paycheck. There, they met Hollander who asked where she had been. She replied that she had received a telephone call from Janetzke to the effect that she had been fired. When Hollander remarked that he (Janetzke) knew more about it than he, Wilson stated that it made no difference because she quit on Monday.[38] Hollander also informed her that not calling in for 3 days constituted an automatic quit, and he also complained that she had belittled him in her testimony at the prior hearing.

Conclusions

The General Counsel contends that Wilson was constructively discharged on April 19. Respondent in its brief appears to take the position that she quit on April 15. It appears, and I find, that Wilson declined to report for work on Monday, April 15, because of her decision to no longer operate the elbow machine unless she was given appropriate relief. With that in mind and pursuant to Janetzke's suggestion, she and Reese, attempted

37. Although some female employees testified on behalf of Respondent that they operated the elbow machine all day for extended periods, Burgher admitted that for quite some time there had been a practice for two girls to alternate working on the machine for half a day at a time.

38. These findings are based upon the credited composite testimony of Marjorie Pratt, Hollander, McGoon, and Burgher. Wilson testified that Hollander asked her twice whether she was coming back, and that either she or her husband replied that she was not going to tolerate any more harassment.

unsuccessfully to discuss the matter with Hollander. Upon learning how Hollander rebuffed them, Janetzke requested Rector to intercede on Wilson's behalf with Hollander. After consulting Hollander, Rector advised Janetzke that Hollander insisted that his work assignments would have to be followed, which in effect, meant that no relief would be forthcoming for Wilson. At the subsequent meeting on April 19, Wilson or her husband plainly stated that she would not submit to any further harassment and would not operate the elbow machine without appropriate relief. I conclude from the foregoing that Wilson declined to work on or after April 15 unless regularly relieved on the elbow machine. Inasmuch as no relief was thereafter offered to her, I find that she quit on the last working day preceding April 15, presumably April 11. I find further that Hollander strongly resented her because of the testimony she gave in the prior hearing, which was personally degrading to him, and her union support, and he declined to follow in her case the usual established policy of providing a half day relief on the elbow machine. Hollander was following his pattern of making it very difficult, if not intolerable, for union adherents to continue working in the plant. I conclude that Wilson's quit was induced by Hollander's discriminatory tactics and constituted a constructive discharge in violation of Section 8(a)(3), (4), and (1) of the Act.

2. The alleged discriminatory warning notices

It is contended that the warning notices given to Wells and Tackett constituted discriminatory action in violation of Section 8(a)(1) and (3) of the Act.

As appears above, Wells and Tackett received warning notices for alleged infractions of the posted rules. The evidence reflects, and I find, that both employees raised reasonable doubts The evidence viewed in its entirety establishes that Hollander, Moreover, I find it unnecessary to resolve their responsibility. The evidence viewed in its entirety establishes that Hollander, motivated by vindictiveness, followed a pattern of retaliation

against employees who supported the Union and/or testified adversely to him in the prior Board hearing. He used the warning notices apparently as a new device, to indicate his displeasure with union adherents and opposition to the Union. I, therefore, conclude that the issuance of the warning notices changed the terms and conditions of employment and thereby constituted violations of Section 8(a)(1), (3), and (4) of the Act.

Furthermore, regardless of whether Wells and Hackett actually committed infractions of the rules, the rules, themselves, as appear *infra,* were adopted and implemented in violation of Section 8(a)(5) of the Act. Thus, the use of the warning notices were *per se* violative of the Act.

d. *The Alleged 8(a)(5) Violations*

The General Counsel contends that in violation of Section 8(a)(5) of the Act, Respondent unilaterally instituted the work rules referred to above, including penalties to be imposed on offenders, issued warning notices pursuant thereto for infractions, and unilaterally instituted a 90-day probationary period for new hires, at a time when Respondent was obligated to recognize and bargain with the Union pursuant to its certification. The General Counsel contends further that Hollander's refusal to discuss Wilson's grievance with Reese for relief on the elbow machine. denied union representation to Wilson, also in violation of Section 8(a)(5).

As found above, the evidence does not establish the prior existence and/or posting of each or any of the rules before their posting herein. Even assuming that some had been posted years ago, I find they have been abandoned by lapse of time and were unilaterally revived and invoked. Nor is it necessary to determine which, if any, of the rules constitute mandatory subjects of bargaining. The fact that penalties were prescribed for breaches thereof sufficiently affected the conditions of employ-

ment to make them mandatory subjects of bargaining. Their unilateral promulgation and implementation were in derogation of Respondent's obligation to bargain pursuant to the Union's certification in violation of Section 8(a)(5) and (1) of the Act.[39]

I find no merit in General Counsel's contention that Wilson was deprived of union representation when Hollander declined to talk to Reese about her grievance. The testimony of Reese shows that in refusing to discuss anything with Reese, Hollander told her "If you have anything to say about the Union or any of my employees you are to go through my representative, Harvey Rector," and that she was ordered to leave the plant. It appears further that shortly thereafter Janetzke discussed the matter with Rector and it was expeditiously resolved adversely to Wilson. I find that Hollander did not deny Wilson union representation but, in fact, declined to represent himself and insisted that the grievance or other union matters be discussed with Rector, his representative, which is what subsequently transpired. In view of these circumstances, I find that the General Counsel has failed to establish a violation of Section 8(a)(5) of the Act with respect to Wilson's grievance and union representation.

Upon the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. At all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

2. At all times material herein, Respondent has been engaged in commerce as an employer within the meaning of Section 2(6) and (7) of the Act.

---

39. *The Timken Roller Bearing Co.*, 70 NLRB 500, 502, fn. 3, set aside on other grounds 161 F. 2d 949 (C. A. 6); *Tower Hosiery Mills, Inc.*, 81 NLRB 658, 660.

3. The Union is the duly certified collective bargaining representative of Respondent's employees in the following appropriate unit:

All production and maintenance employees at the Employer's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors, as defined in the Act.

4. Respondent has interfered with, restrained, or coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, within the meaning of and in violation of Section 8(a)(1) of the Act, by promulgating and maintaining no-solicitation and no-distribution rules, interrogating employees concerning union matters, and admonishing employees not to associate with union adherents.

5. In violation of Section 8(a)(3) and/or (4) of the Act, Respondent discriminatorily discharged John Haywood, David Leffler, Pauline Messer, Claudine Tackett, and Phyllis Wilson.

6. In violation of Section 8(a)(3), (4), and (1) of the Act, Respondent discriminatorily changed the terms and conditions of employment by issuing warning notices to employees Wells and Tackett.

7. In violation of Section 8(a)(5) and (1) of the Act, Respondent failed to bargain with the Union by unilaterally and without consultation with the Union posting and adopting work rules, and instituting a probationary period of employment for new employees.

8. Respondent did not commit alleged violations not specifically found herein.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), (4), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has discriminatorily discharged certain employees, I shall recommend that Respondent recall all employees so discharged and offer to reinstate them to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay shall be computed on a quarterly basis and in a manner consistent with the Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. Having found that warning notices were issued to certain employees by Respondent in violation of the Act, I shall recommend that it rescind such notices and delete them from the employment records of said employees. Having found that Respondent failed to consult and/or bargain with the Union as the duly certified bargaining representative of its employees in the unit found appropriate regarding the terms and conditions of employment, I shall recommend that it rescind and withdraw its posted work rules and regulations and the practices of hiring new employees on a probationary basis, and bargain with the Union concerning such terms and conditions of employment.

The Union also requests, in addition to backpay recommendations made herein, that the employees be made whole for any wages and benefits which they might have received had Respondent bargained in good faith and negotiated a bargaining agreement. The request is not recommended on the grounds that the Board has not adopted that policy, which is pending consideration before it, nor was evidence adduced for its support at the hearing herein.

In view of the broad scope and nature of the unfair labor practices found herein and Respondent's past history of unfair labor practices, I shall recommend that it cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing findings of fact and conclusions of law and upon the entire record in these cases, I recommend the following:

RECOMMENDED ORDER

Respondent, Tiidee Products, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Promulgating and maintaining no-solicitation rules prohibiting employees during nonworking time from soliciting for the Union on Respondent's property.

(b) Promulgating and maintaining no-distribution rules prohibiting employees during nonworking time from distributing materials on behalf of the Union in nonworking areas of Respondent's property.

(c) Interrogating employees concerning union matters within the meaning of Section 8(a)(1) of the Act.

(d) Coercing or restraining employees from associating with union adherents within the meaning of Section 8(a)(1) of the Act.

(e) Discriminatorily discharging, laying off, or forcing termination of, or otherwise discriminating against employees in order to discourage membership in or support of International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization.

(f) Failing to bargain with the aforesaid Union by unilaterally posting and adopting work rules without consultation with the Union as the duly certified exclusive bargaining representa-

tive of its employees concerning terms and conditions of employment in the following appropriate unit:

All production and maintenance employees at Respondent's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

(g) Discriminatorily changing the terms and conditions of employment by issuing warning notices to employees imposing disciplinary measures for infraction of work rules in order to retaliate against union adherents and to discourage membership in the aforesaid Union.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer John Haywood, David Leffler, Pauline Messer, Claudine Tackett, and Phyllis Wilson, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify those employees set forth above, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Rescind and withdraw the posted work rules and regulations.

(d) Rescind and delete from the personnel files of employees William Wells and Claudine Tackett the warning notices heretofore given to them for alleged infractions of the posted work rules.

(e) Upon request, bargain collectively with the aforesaid Union as the duly certified collective-bargain representative of its employees in the unit found appropriate with respect to the terms and conditions of employment and embody in a signed agreement any understanding reached.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the rights of employment under the terms of this Recommended Order.

(g) Post at its Dayton, Ohio, plant copies of the attached notice marked "Appendix."[40] copies of said notices, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's official representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

---

40. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order.

(h) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[41]

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D. C., April 11, 1969.

Certified True Copy
O. W. FIELDS
Executive Secretary, NLRB
Date April 11, 1969

41. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

This notice is posted pursuant to a Recommended Order of the Trial Examiner, issued after a trial in which both sides had the opportunity to present evidence. The Trial Examiner found that we violated the National Labor Relations Act and has ordered us to inform our employees of their rights.

The Act gives all employees the following rights:

> To organize themselves, to form, join or help unions, to bargain as a group through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection or to refuse to do any and all of these things.

We assure all our employees that:

WE WILL NOT unlawfully interrogate employees concerning their union activities.

WE WILL NOT discharge, lay off, force termination of, or otherwise discriminate against employees in order to discourage membership in or support of International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization.

WE WILL NOT promulgate, maintain, or enforce no-solicitation rules prohibiting solicitation on behalf of the Union during nonworking time on our property.

WE WILL NOT promulgate, maintain, or enforce no-distribution rules prohibiting the distribution of material on behalf of the Union during nonworking time in nonworking areas of our property.

WE WILL NOT change working conditions of our employees by posting work rules and regulations and imposing penalties for infractions thereof without consulting with the Union, nor will we post such rules and regulations in order to retaliate against our employees for their union support.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL made whole John Haywood, David Leffler, Pauline Messer, Claudine Tackett, and Phyllis Wilson for any loss of earnings they may have suffered by reason of their discriminatory discharges and offer them reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL notify any of the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL rescind and delete from the personnel files of employees William Wells and Claudine Tackett the warning notices heretofore given to them for alleged infractions of the posted work rules.

WE WILL rescind and withdraw the posted work rules and regulations.

WE WILL, upon request, bargain collectively with the above Union as the duly certified collective-bargaining representative in the unit found appropriate for bargaining purposes with respect to the terms and conditions of employment and, if an understanding is reached, we will embody such terms in a signed agreement.

TIDEE PRODUCTS, INC.
(Employer)

Date..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio Telephone 513-684-3686.

176 NLRB No. 133

D-3003
Dayton, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIIDEE PRODUCTS, INC. and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO	Cases 9-CA-4618 9-CA-4639-2 9-CA-4710

DECISION AND ORDER

On April 11, 1969, Trial Examiner William W. Kapell issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices in violation of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,[1] the exceptions and

1. In his Decision, the Trial Examiner inadvertently cites Case 9-CA-4440 as Case 9-CA-440. He also inadvertently failed to place the word "not" between the words "is" and "necessary" at line 43 in footnote 23 of his Decision. These inadvertencies are hereby corrected.

briefs, and the entire record in this case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Tiidee Products, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated Washington, D. C. June 24, 1969.

FRANK W. MCCULLOCH, *Chairman*
GERALD A. BROWN, *Member*
SAM ZAGORIA, *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD

2. These findings are based, in part, upon credibility determinations of the Trial Exminer to which the Respondent has excepted. After careful review of the record, we conclude that these credibility findings are not contrary to the clear preponderance of all relevant evidence. Accordingly, we find no basis for disturbing these findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C. A. 3).

194 NLRB No. 198

D-5655
Dayton, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIIDEE PRODUCTS, INC. and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC	Cases 9-CA-4440 9-CA-4488 9-CA-4536 9-CA-4563

SUPPLEMENTAL DECISION AND ORDER

On February 24, 1969, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, finding that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended.[1] The Board, *inter alia*, ordered Respondent to bargain with the Union upon request, but it did not grant the Union's proffered broader remedial order. The Union sought backpay to make the employees whole for wages and benefits lost due to Respondent's unlawful refusal to bargain, and reimbursement for lost initiation fees and dues.

Thereafter, on April 3, 1970, the United States Court of Appeals for the District of Columbia Circuit enforced in full the Board's Order.[2] However, upon the Union's petition for review of the Board's Order, the court remanded these cases for further proceedings not inconsistent with its opinion. The

1. 174 NLRB No. 103.

2. *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *N. L. R. B.*, 426 F. 2d 1243 (C. A. D. C.), rehearing denied, ... F. 2d .... (C. A. D. C.) (September 21, 1970), cert. denied, 400 U. S. 950.

Board, having accepted the remand, issued a notice to the parties requesting statements of position. The Union and Respondent each filed such statements.[3]

The Board has given full consideration to the views of the court of appeals as expressed in the instant proceeding and the parties' contentions in their respective statements of position. For the reasons more fully set forth hereinafter, the Board has concluded that it would effectuate the policies of the Act to grant some but not all of the requested additional relief.

The Union asserts that the court of appeals' conclusion that the Board has the power under the Act to issue a make-whole remedial order is the "law of the case." It contends, moreover, that under the circumstances of these cases the Board should exercise that power and either determine on the record before the Board what dollar amount, if any, is necessary to make whole each employee for all losses sustained due to Respondent's unlawful refusal to bargain or remand this proceeding to a Trial Examiner for a hearing to determine that question. The Union also seeks organizational expenses, litigation costs, reimbursement for lost initiation fees and dues, and any other remedies that would effectuate the policies of the Act.

Respondent contends that the court of appeals erred in questioning the Board's determination not to award additional relief. Respondent argues that no additional relief is warranted; it would have the Board merely reiterate its previously announced conclusion that the Act does not empower the Board to issue a make-whole order.[4]

---

3. The Union filed a motion to consolidate this proceeding with those cases comprising *Tiidee Products, Inc.*, 176 NLRB No. 133, enfd. and remanded, 440 F. 2d 298 (C. A. D. C.). We find no merit in the Union's contentions and its motion is hereby denied.

4. See *Ex-Cell-O Corporation*, 185 NLRB No. 20, enfd. *sub nom. International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW* v. *N. L. R. B.*, 449 F. 2d 1046 (C. A. D. C.) 449 F. 2d 1058 (C. A. D. C.), and *Heck's, Inc.*, 191 NLRB No. 146. In the aforementioned cases the refusals to bargain rested upon "debatable questions" concern-

In its Decision, the Board found that Respondent had violated Section 8(a)(1), (3), and (5) of the Act. As a remedy for the 8(a)(5) violation, the Board ordered Respondent to bargain collectively with the Union upon request. The Board rejected the Union's request that in addition to the traditional cease-and-desist order Respondent be required to make the employees whole for monetary losses suffered as a result of the unlawful refusal to bargain.

In *Ex-Cell-O* the Board majority enunciated its conclusion that Congress did not give the Board statutory authority to grant the compensatory monetary remedy requested by the Union. The court of appeals disagreed with this view of the scope of the Board's statutory remedial power and it remanded these cases to the Board for further proceedings not inconsistent with the court's opinion. Although the Board adheres to the views expressed in *Ex-Cell-O*, inasmuch as it has accepted the remand, it considers itself bound by the court's opinion as the "law of the case."

A close analysis of the court's opinion reveals that the court did not decide that the Board must issue a make-whole remedial order in these cases. It did, however, question the adequacy of the conventional bargaining order under the circumstances of this proceeding:

> We cannot discern, and the Board has not explained, on what basis it could or did conclude that its order under review is designed "to insure meaningful bargaining."[5]

The court noted that the bargaining order herein was "counterproductive" and actually rewarded Respondent's refusal to bargain during the critical period following the Union's certifica-

---

ing the validity of the underlying representation determinations whereas here the court of appeals found that Respondent raised a frivolous question when it objected to certain union preelection conduct allegedly affecting the results of the election and thereafter contested the Regional Director's refusal to order a hearing on the objection.

5. 426 F. 2d at 1249.

tion as the collective-bargaining representative. Thus, the court stated, during the delay in bargaining Respondent enjoyed lower labor expenses and probably will continue to do so in the future because the Union, probably having lost the allegiance of a majority of the unit employees, will not be able to bargain effectively. The court suggested that the Board consider other remedies to "prevent the employer from having a free ride during the period of litigation."[6] Finally, the court concluded that the bargaining order encourages frivolous litigation before the Board and the courts.

The court urged the Board to consider the advisability of a make-whole remedy:

> . . . which could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely that parties *would* have agreed to . . .[7]

had they engaged in the kind of bargaining required by the Act. But the court also entered a caveat that it was not suggesting that the make-whole remedy would be appropriate "under circumstances in which the parties would have been unable to reach agreement by themselves."[8] Finally, the court stated:

> . . . we accompany our remand with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief, in whole or in part. If the Board believes that alternative remedies,[15] beyond those already granted, are more appropriate, it should so state. The assessment of these matters is for the Board.

15. The scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these.[9]

6. *Id.* at 1251.
7. *Id.* at 1252.
8. *Id.* at 1253.
9. *Ibid.*

We have carefully considered the Union's request for a make-whole remedy in light of the record herein and have decided that it is not practicable. The Union suggests that we determine what the parties *"would* have agreed to" in 1967 and thereafter on the basis of a record which contains only a proposed collective-bargaining agreement submitted by the Union to Respondent on December 18, 1967; a chart comparing the wages then paid by Respondent for certain job classifications with those paid by other employers in comparable industries in the Dayton area who were then under contract with the Union; testimonial evidence of employee wage rates as of the date of the hearing herein and a list thereof as of May 25, 1970; certain testimony about the time required to negotiate a first contract; and several charts and tables depicting nationwide changes in wages and benefits since 1967. We know of no way by which the Board could ascertain with even approximate accuracy from the above what the parties *"would* have agreed to" if they had bargained in good faith.[10] Inevitably, the Board would have to decide from the above what the parties *"should* have agreed to." And this, the court stated, the Board must not do.

Alternatively, the Union suggests that the Board remand this proceeding to a Trial Examiner apparently without standards for a hearing to devise a "make-whole" formula for backpay to be awarded employees, if any. This would result in long delay while these cases wound their way through the Trial Examiner, the Board, and, ultimately, the courts. Meanwhile, Respondent, which is under order to bargain with the Union, is not likely to agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain. This would

10. In his dissent, Judge MacKinnon noted, "the history of this case seems to make it clear that the most realistic prediction would be that the parties would not have agreed to anything. Any other conclusion is difficult to reach in light of the Company president's 'antiunion animus' and the 'patently frivolous' objections to the election." *Id.* at 1256.

further delay the commencement of meaningful collective bargaining and thus not effectuate the purpose of the Act.

However, while we find that it would be counterproductive to grant the Union's request for a remand to a Trial Examiner, the Board believes that the alternative remedies provided hereinafter will undo some of the baneful effects pointed out by the court as having resulted from Respondent's "clear and flagrant violation of the law."[11] They will, for one, aid the Union in rebuilding its strength so that it may bargain effectively with Respondent. Also, by requiring Repondent to pay some of the Board and union litigation costs occasioned by its misconduct, similar "brazen" refusals to bargain will be discouraged. Although these remedies are not theoretically perfect, we believe that they are as far as we can go in the circumstances.

1. In the ordinary unfair labor practice case, the notice to employees which accompanies the Board's order is posted for 60 days at the employer's place of business. However, to assure that the employees involved here fully and carefully read the notice, that Respondent's new employees unfamiliar with the history of the instant proceeding understand the reasons for the delay in collective-bargaining negotiations, and that the unit members realize that the Government protects their Section 7 right to select a collective-bargaining representative, we shall require that copies of the posted notices be mailed to each of the employees in the unit at his home.[12]

2. Given all the circumstances of the instant proceeding and those of *Tiidee Products. Inc., supra* note 3, it is clear that the Union in essence will have to "reorganize" the unit employees despite its outstanding Board certification prior to commencing collective-bargaining negotiations with Respondent.[13] In order

13. We agree with our concurring colleague that the Board should neither concern itself with "how many dues-paying members the Union is able to obtain" nor "indicate that this impartial and

11. *Id.* at 1248.

12. Cf. *Heck's, Inc.*, 191 NLRB No. 146.

that the employees may have free and ready access to information from the Union concerning all aspects of unionization and the collective-bargaining negotiations which should occur in the immediate future, the Board will order that the Union be given reasonable access to Respondent's bulletin boards and other places where notices to employees are customarily posted, during the period of contract negotiations, for the posting of union notices, bulletins, and other literature.[14]

Similarly, and especially during the period prior to the commencement of negotiations, the Board finds that it would facilitate the Union's reclaiming the allegiance of the unit employees if it were able to meet with the individuals involved in order to explain to them the circumstances of the instant proceedings and the Union's plans for the future. While several methods for achieving this objective are available, we find least burdensome on all the parties the requirement that Respondent furnish the Union with a list of names and addresses of its employees and keep said list current for a 1-year period. Accordingly, we shall order Respondent to furnish the Union with such list for 1 year from the date of this Supplemental Decision.

3. The Union asserts that an award to it of organizational expenses, litigation costs and expenses, and lost initiation fees and dues would meet another of the court of appeals' objections to the Board's order; *viz.* that our traditional remedy rewarded Respondent delaying tactics and increased the likelihood that

---

neutral Agency has any view as to whether the employees ought to join or not join either this or any other union." However, our concurring colleague misconstrues the purpose of our Decision. All that we are doing is restoring to the duly certified collective-bargaining representative the opportunity to achieve again, via a readier route, what it had previously obtained by its own efforts, but then lost through Respondent's frivolous litigation. Moreover, as the court noted, our already enforced bargaining order would not insure meaningful collective bargaining unless the Union were given the opportunity to regain the allegiance of a majority of the unit employees.

14. Cf. *Heck's, Inc., supra,* fn. 20, and *J. P. Stevens & Co., Inc.,* 171 NLRB No. 163, enfd. 417 F. 2d 533 (C. A. 5).

similar frivolous litigation would clog future Board and court calendars.

It is clear that the Union incurred no extraordinary organizational expenses because of Respondent's patently frivolous objection to the election and subsequent refusal to bargain. Despite certain already remedied preelection unlawful Respondent conduct, the Union was selected by the employees after a 2-month campaign at the first election held. We find, therefore, no nexus between Respondent's unlawful conduct hereunder examination and the Union's preelection organizational expenses and, accordingly, we shall not award them to the Union.

The Union asserts that because it is union policy not to collect initiation fees and dues until a contract is executed, it has received nothing from the unit employees throughout the course of this proceeding. It therefore now seeks to recover the initiation fees and dues lost due to Respondent's refusal to bargain. We view this claim as partaking of a request for a make-whole remedy, which we have declined to order, since presumably the dues and fees sought would have come from lost wages. Moreover, since it is union policy to chance the loss of initiation fees and dues in *all* cases until a contract is negotiated, if ever, we find no reason to have Respondent assume that risk at this point. Clearly, the Union during the instant proceeding could have elected to assess its members for dues and fees.[15]

We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.[16].

We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the

15. See fn. 13, *supra.*

16. *Heck's, Inc., supra,* fn. 20.

nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowed Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses. Accordingly, we shall order Respondent to pay the Board and the Union the above-mentioned litigation costs and expenses.[17]

As we have concluded that it would best effectuate the policies of the Act to require Respondent to take certain action in addition to the action previously ordered, we shall issue the following:

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tiidee Products, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the following affirmative action in addition to that previously ordered which the Board finds will effectuate the policies of the Act:

---

17. See also Rule 38, Federal Rules of Appellate Procedure. Cf. *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 166; *Schauffler* v. *United Association of Journeymen*, 246 F. 2d 867 (C. A. 3, 1957).

(a) Mail a signed copy of the attached revised notice marked "Appendix" to each of its employees immediately upon receipt thereof from the Regional Director for Region 9.

(b) Upon request of the Union, made within 1 month of the date of this Supplemental Decision, immediately grant the Union and its representatives reasonable access, for the period of the collective-bargaining negotiations, to its bulletin boards and all places where notices to employees are customarily posted.

(c) Upon request of the Union, made within 1 month of the date of this Supplemental Decision, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(d) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings.

Dated, Washington, D. C. Jan. 21, 1972.

JOHN H. FANNING, *Member*
HOWARD JENKINS, JR., *Member*
RALPH E. KENNEDY, *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MILLER, Concurring:

I concur fully with my colleagues in their conclusions as to what additional remedies should be ordered herein.

I have, however, somewhat separate views as to rationale, as indicated below.

The Union is entitled to bulletin board use, in my view, only as a remedy for the interruption in communication between the Union and the employees which has been occasioned by Respondent's frivolous resort to extended litigation. For the same reason, I concur in the order requiring that Respondent furnish the Union with a current list of employee names and addresses.

To the extent, however, that my colleagues indicate that their purpose in providing this remedy is affirmatively to ally this Board with the Union's "reorganizational" efforts, I must dissociate myself from their views. We have a legitimate purpose in implementing the original choice by the employees in selecting this Union as a bargaining agent and in assuring that there is full opportunity for communication with the employees. But it is not our function, as I see it, to concern ourselves with how many dues-paying members the Union is able to obtain, nor to indicate that this impartial and neutral Agency has any view as to whether the employees ought to join or not join either this or any other union. It is, therefore, *not* part of *my* reason for joining in these remedies, "to facilitate the Union's reclaiming the allegiance of the unit employees," as the majority puts it.

I would also differ with my colleagues, in some degree, with respect to their rationale for denying the requested relief for dues which it did not receive from employees. They seem to have been persuaded, in part at least, by the Union's policy of waiving dues and initiation fees during the organizational period. That, to me, is unimportant, and, furthermore, I would not wish to suggest that we might reach a different result if the Union had not had such a policy, since I do not think it proper for this

Board, perhaps unwittingly, to allow our processes to influence unions in an area in which they should be free to make such policy choices wholly apart from any considerations of how they might affect our determination in any Board proceeding.

In this area, too, my reason for denying the relief is simply that we have no legitimate interest in how many dues-paying members a union can attract. Our only interest, to repeat what I have said earlier in this opinion, is to implement the majority choice of representative which was made in the election. It is *not* to insure that the Union has either a large or small membership, nor that it should obtain from the work force a large or a small amount of dues or initiation fees. We are *not* providing damages for any private interests of the Union which may have been injured by the illegal employer conduct or by its frivolous resort to litigation. We *are* protecting employees' Section 7 rights and the integrity of our own processes. But whether the Union or any other organization lost revenue as an incident of violations of our Act is relevant, if at all, only in a private lawsuit, and not in a forum designed only to protect and enforce public policy.

The reimbursement of the Union and the Board for costs and expenses is in a different category. Since violation of our Act can be asserted only by private parties' charges, if they are forced to make such charges and to participate in extended proceedings by a respondent's frivolous resistance to the orderly application of our Act, I believe this to be a suitable remedy and one necessary for the protection of the public interest.

Dated, Washington, D. C. Jan. 24, 1972.

EDWARD B. MILLER, *Chairman*
NATIONAL LABOR RELATIONS BOARD

D—5685

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has told us to post and mail this notice about what we are committed to do.

The Act gives all employees these rights:

To organize themselves

To form, join, or help unions

To bargain as a group through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refuse to do any and all of these things

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten our employees with plant closure, or discharge, or with any other types of reprisals because they have selected International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, as their exclusive bargaining representative.

WE WILL NOT attempt to get employees to inform on the union activities and desires of their fellow employees.

WE WILL NOT unlawfully interrogate employees concerning their union membership, activities, or desires, nor will we unlawfully poll our employees in order to discover their sentiments about the Union.

WE WILL NOT lay off employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discharge employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discriminatorily change terms and conditions of employment because employees voted in favor of union representation, or in order to discourage membership in the Union.

WE WILL NOT refuse to bargain collectively with the above Union as the certified collective-bargaining representative of the employees in the following unit:

> All production and maintenance employees at our Dayton, Ohio, plant, excluding all office clerical employees, technical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with information that will enable it to function as the bargaining representative of our employees in the above unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole Virginia Sawmiller and Wanda Reagan for any loss of earnings they may have suffered by reason of their discriminatory discharges.

WE WILL recall and make whole all employees who were discriminatorily laid off by us.

WE WILL notify any of our employees if currently in layoff status and if presently serving in the Armed Forces of the United States of their rights to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL bargain collectively with the above Union as the duly certified collective-bargaining representative of our employees in the above unit and, if an understanding is reached, we will sign a contract with the Union.

WE WILL mail a signed copy of this notice to all our employees.

WE WILL grant the Union reasonable right to utilize our bulletin boards during negotiations.

WE WILL, upon the request of the Union, immediately give to the Union a list of names and addresses of all our employees, and WE WILL keep the list current for a period of 1 year.

WE WILL reimburse the Union and the National Labor Relations Board's General Counsel for their costs and expenses in connection with this proceeding.

TIIDEE PRODUCTS, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.

196 NLRB No. 27

D-6003
Dayton, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIIDEE PRODUCTS, INC. and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO	Cases 9-CA-4618 9-CA-4639-2 9-CA-4710

SUPPLEMENTAL DECISION AND ORDER

On June 24, 1969, the Board issued its Decision and Order in this case[1] finding that Respondent had engaged in various unfair labor practices, including the violation of Section 8(a)(5) by the unilateral promulgation and implementation of work rules and the unilateral institution of a new hiring procedure. The Board ordered Respondent to bargain with the Union but found no merit in the Charging Party's request for additional extraordinary remedies. Thereafter, on December 23, 1970, the Court of Appeals for the District of Columbia enforced the Board's Order[2] against the Respondent. The court, however, remanded the case to the Board for consideration of the Charging Party's request for additional relief in light of the court's decision in a prior proceeding against *Tiidee Products*, [3] hereafter referred to as *Tiidee I*. Having accepted the remand of

1. 176 NLRB 968.

2. *International Brotherhood of Electrical, Radio and Machine Workers, AFL-CIO* v. *N. L. R. B.*, 440 F. 2d 298 (C. A. D. C.).

3. *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *N. L. R. B.*, 426 F. 2d 1243 (C. A. D. C.), enfg. in part and remanding in part 174 NLRB 705, cert. denied 400 U. S. 950 (1970).

these cases, the Board issued a notice to the parties, requesting statements of position. Thereafter the Charging Party and Respondent each filed a statement.

In its decision remanding *Tiidee I*, the court stated:

> The Company's refusal to bargain was a clear and flagrant violation of the law. Its objections to the election were patently frivolous, and violated the express terms of the Agreement for Consent Election. . . .[4]

Upon our consideration of that matter on remand, we stated:

> We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the Nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings.[5]

Although the court's decision remanding *Tiidee II* contains no language specifically finding this litigation frivolous, the court nevertheless directed that the Charging Party's request for additional relief be considered "in light of [the court's] April 3 decision in Tiidee I."

In the instant case, Respondent violated Section 8(a)(1), (3), and (4) of the Act by conduct which, as did its like conduct in *Tiidee I*, clearly manifested its hostility toward the concept of collective bargaining and animus toward employees who it believed espoused unionization. Additionally while pursuing in *Tiidee I* its frivolous objections to recognizing and bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act in the instant case by ignoring its employees' statutory representative and unilaterally effecting changes in the employment relationship. In such circumstances, Respondent's refusal to bargain with the Union over mandatory subjects of collective bargaining in the instant case cannot be viewed in

4. 426 F. 2d at 1248.

5. *Tiidee Products, Inc.*, 194 NLRB No. 198.

isolation. Rather, it must be examined in the total context of Respondent's entire course of unfair labor practices. So, considered, the conclusion is inescapable that the later conduct was a continuation of the conduct begun in *Tiidee I* and was similarly in furtherance of Respondent's ultimate objective; i.e., to deny to its employees the exercise of those rights guaranteed to them by Section 7 of the Act. It is in this light that we must determine whether or not the remedy herein should be revised.

In the instant proceeding, as in *Tiidee I*, the Union requests a make-whole remedy and reimbursement, as well as other relief, or remand to a Trial Examiner. Respondent opposes any such action. We have carefully considered the Union's contentions and Respondent's argument in opposition thereto. In view of our finding in *Tiidee I* that frivolous issues were raised and litigated to postpone or avoid a lawful obligation to bargain,[6] and as Respondent's conduct in the instant case is so inextricably intertwined with Respondent's refusal on frivolous grounds to bargain with the Union as to require the conclusion that it was part of the same pattern of patently frivolous litigation for the same unlawful object, we are persuaded that additional remedies should be granted here to undo some of the effects of the Respondent's unlawful conduct.

1. Previously in this case, as in any ordinary unfair labor practice case, we ordered that the notice accompanying the Board's Order the posted for 60 days at Respondent's place of business. We are now of the view that further action is appropriate. Accordingly, to assure that the employees involved have the opportunity to read the notice in privacy; that Respondent's new employees, not familiar with the history of this proceeding, understand the reasons for the delay in collective-bargaining negotiations; and that unit employees understand their Section 7 right to select a collective-bargaining representative is protected under this Act, we shall require that a copy of the posted notice be mailed to the home of each unit employee.

---

6. *Ibid.*

2. For the reasons set forth in our Supplemental Decision in *Tiidee I* we find on the facts of this case that, in view of the totality of circumstances, it would be just and proper to order Respondent to reimburse the Board and the Charging Party for their expenses incurred in the investigation, preparation, and conduct of this second case,[7] including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and *per diem*, and other reasonable expenses. As such costs and expenses were in effect imposed upon the Charging Party and the Government by Respondent's frivolously based refusal to accord its employees the fruits of their exercise of rights guaranteed by Section 7 of the Act, or reimbursement order remedies certain direct effects of Respondent's unfair labor practices. Moreover, the order will tend to deter similar future infringements of employees' exercise of Section 7 rights by Respondent and other persons. Accordingly, we are satisfied that our reimbursement order effectuates the policies of the Act and is in the public interest.[8]

---

7. The reimbursement order in *Tiidee I* was predicated on the frivolous nature of the 8(a)(5) violation. Similarly in the instant case the 8(a)(5) violation warrants this remedy, but as we are unable to allocate the particular costs of litigating the refusal to bargain as distinguished from the other unfair labor practices we shall direct payment of all costs.

8. Member Kennedy concurs in the majority's decision to order Respondent to reimburse the Board and the Charging Party for their litigation costs and expenses. As in *Tiidee I*, Respondent has refused to recognize the validity of the underlying representation election and the Board's certification of representative issued to the Union. Instead, it has chosen to rest its refusal to deal with the Union upon certain objections to the election which the court of appeals found to be frivolous in *Tiidee I*. It follows, therefore, in Member Kennedy's view, that in remanding this case to the Board "in light of" its decision in *Tiidee I*, the court of appeals was in essence finding that the instant case constituted frivolous litigation. Having accepted the remand in this case, he feels bound by the "law of the case" to order Respondent to reimburse the Board and the Charging Party for their costs and expenses in this frivolous litigation.

3. In the Supplemental Decision in *Tiidee I*, we rejected the Union's request for recovery of lost initiation fees, dues and other similar costs, and for backpay to employees. For the same reasons, we deny that request in the instant case. In addition, as we directed in that Supplemental Decision that employee lists be furnished and that the Union be allowed access to the Respondent's bulletin board, there is no need to include such an order herein.

Inasmuch as we have concluded that it would best effectuate the policies of the Act to require Respondent to take certain action in addition to that previously ordered, we issue the following:

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Relations Board hereby orders that the Respondent, Tiidee Products, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall, in addition to all affirmative action previously ordered by the Board, take the following action:

(a) Mail a signed copy of the attached notice marked "Appendix" to each of its employees immediately upon receipt thereof from the Regional Director for Region 9.

(b) Pay to the Board and to the Union the costs and expenses incurred by them in the investigation, preparation, and presentation of this case before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of this proceeding.

Dated, Washington, D. C.
Apr 6 1972

.....
JOHN H. FANNING, *Member*

.....
HOWARD JENKINS, JR., *Member*

.....
RALPH E. KENNEDY, *Member*

(SEAL) National Labor Relations Board

CHAIRMAN MILLER, dissenting in part:

As the majority opinion points out, our decision in *Tiidee I* to award costs and attorneys' fees was based on the court's finding that the litigation there had been frivolously engaged in by Respondent.

In reviewing the record in the instant case, I am unable to find that the defense here was asserted frivolously. The majority opinion here seems to me to evade this issue and to rely on the extent of Respondent's unfair labor practices (which, however reprehensible, are no more extensive than those committed by both unions and employers in a considerable percentage of the 800 or so cases we review each year) and on the degree of Respondent's union animus and hostility. But the degree of Respondent's hostility has little or nothing to do with the frivolity of its defenses to the allegations of the complaint in this proceeding.

For these reasons I dissent from that portion of this Decision which awards costs and attorneys' fees.

Dated, Washington, D. C.

Apr 6 1972

.....

EDWARD B. MILLER, *Chairman*

National Labor Relations Board

D—6003

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had the opportunity to present their evidence, the National Labor Relations Board found that certain conduct by us violated the law. The Board therefore has ordered us to post and mail a copy of this notice to each employee to inform our employees of their rights.

The National Labor Relations Act gives all employees the following rights:

> To organize themselves, to form, join, or help unions, to bargain as a group through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refuse to do any and all of these things.

We assure all our employees that:

WE WILL NOT do anything which interferes with these rights.

WE WILL NOT unlawfully interrogate employees concerning their union activities.

WE WILL NOT discharge, lay off, force termination of, or otherwise discriminate against employees in order to discourage membership in or support of International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization.

WE WILL NOT promulgate, maintain, or enforce no-solicitation rules prohibiting solicitation on behalf of the Union during nonworking time on our property.

WE WILL NOT promulgate, maintain, or enforce non-distribution rules prohibiting the distribution of material on behalf of the Union during nonworking time in nonwork areas of our property.

WE WILL NOT change working conditions of our employees by posting work rules and regulations and imposing penalties for infractions thereof without consulting with the Union, nor will we post such rules and regulations in order to retaliate against our employees for their union support.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole John Haywood, David Leffler, Pauline Messer, Claudine Tackett, and Phyllis Wilson for any loss of earnings they may have suffered by reason of their discriminatory discharges and offer them reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority of other rights and privileges previously enjoyed.

WE WILL rescind and delete from the personnel files of employees William Wells and Claudine Tackett the warning notices heretofore given to them for alleged infractions of the posted work rules.

WE WILL rescind and withdraw the posted work rules and regulations.

WE WILL, upon request, bargain collectively with the above Union as the duly certified collective-bargaining representative in the unit found appropriate for bargaining purposes with respect to the terms and conditions of employment and, if an understanding is reached, we will embody such terms in a signed agreement.

WE WILL mail a signed copy of this notice to all our employees.

WE WILL reimburse the Union and the National Labor Relations Board's General Counsel for their costs and expenses in connection with this proceeding.

TIDEE PRODUCTS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIIDEE PRODUCTS, INC. and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC	Cases 9-CA-4440 9-CA-4488 9-CA-4536 9-CA-4563

NOTICE

On February 24, 1969, the Board issued a Decision and Order[1] in the above-entitled proceedings, finding that Respondent Tiidee Products, Inc., had violated Section 8(a), (5), (3), and (1) of the National Labor Relations Act, as amended. The Board ordered Respondent to cease and desist from its unfair labor practices and take certain affirmative action to effectuate the policies of the Act.

Thereafter, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, the Union, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order and the Board thereafter applied for enforcement of its Order.

On April 3, 1970, the Court of Appeals issued its decision[2] granting, in full, the Board's application for enforcement of its Order, but remanding the case for further proceedings not inconsistent with its opinion. The Court remanded the case for further consideraion of the Unions' make-whole remedy claim, and directed the Board to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief in whole or in part, or to state its reasons for granting other alternative remedies.

1. 174 NLRB No. 103.
2. F. 2d (C. A. D. C.).

Having accepted the remand, the Board deems it desirable that the parties be afforded an opportunity to file statements of position and briefs with the Board prior to the Board's decision pursuant to the remand. Accordingly,

NOTICE IS HEREBY GIVEN that statements of position and briefs may be filed with the Board in Washington, D. C. on or before June 25, 1970, with respect to the issues encompassed by the remand. Provisions of Section 102.46 of the Board's Rules and Regulations shall apply to any briefs which may be filed pursunt to this Notice.

Dated, Washington, D. C., May 26, 1970.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TIDEE PRODUCTS, INC.,

Respondent.

Nos. 22797, 22911.

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

Argued Oct. 27, 1969.

Decided April 3, 1970.

Petition for Rehearing Denied
July 10, 1970.

Mr. Melvin Washaw, with whom Mr. Irving Abrahamson and Miss Ruth Weyand, Washington, D. C., were on the brief, for petitioner in No. 22,797.

Mr. Eugene B. Granof, Atty., National Labor Relations Board, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Messrs. Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, and Marcel Mallet-Prevost, Asst. General Counsel, National Labor Relations Board, were on the brief, for petitioner in No. 22,911 and respondent in No. 22,797. Mr.

Harold B. Zanoff, Attorney, National Labor Relations Board, also entered an appearance for petitioner in No. 22,911 and respondent in No. 22,797.

Mr. Roy E. Browne, Akron, Ohio, for respondent in No. 22,911.

Before LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:*

This case arises on the Union's petition to review, and on a Board application to enforce an order of the National Labor Relations Board. In its decision and order, reported at 174 NLRB No. 103, the Board found that Tiidee Products, Inc. (the Company) violated subsections (1), (3) and (5) of § 8(a) of the National Labor Relations Act.[1] The Board entered an order forbidding interference with employees' section 7 rights, and requiring that employees unlawfully laid off or discharged be reinstated and made whole for loss of earnings. As to the 8(a)(5) violation, the Board ordered the Company to bargain collectively with the Union and to furnish information pertaining to wage and fringe benefits. The order also required the posting of an appropriate notice.

---

1. These are the material provisions of § 8(a) of the Act, see 29 U. S. C. § 158(a):

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the Act];

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *

* * * * *

The Company concedes the 8(a) (5) violation and some of the 8(a) (1) violations charged, but resists the findings and remedies dealing with the other alleged violations. The Union agrees with the Board's findings but complains that the remedies prescribed are inadequate. We grant the Board's application to enforce the order already entered. On the Union's petition seeking further relief we remand for further proceedings.

A. *The Violations of §§ 8(a)(1) and 8(a)(3)*

1. The Company manufactures metal and plastic parts for mobile homes and trailers. In July of 1967 the Union began to organize the Company's employees. From the very beginning of the drive the Company's president displayed clear antiunion animus, as Company's counsel conceded at oral argument. At the urging of the president certain of the older and more trusted employees began to question their fellow employees about union activity. One employee, possibly on her own initiative, "polled" the employees concerning sentiment toward the Union without any safeguards or assurances that they would not suffer reprisals for their answers. The president of the company made, and certain employees passed on to others, threats to close the plant. The trial examiner and the Board found that the employees who engaged in these activities were supervisory personnel within the meaning of the statute, and thus the Company itself had violated section 8(a) (1) of the Act by coercive actions taken against its employees.

[1-3] The only ground on which the Company seeks to avoid accountability for 8(a) (1) violations is that certain employees "were not supervisors and that their conduct cannot, therefore, be attributed to the Company." The evidence amply supports the Board's conclusion that employees Burgher, Gearing, and Hershey met the statutory standards of having the authority "in the interest of the Company" to "assign," "trans-

fer," and "responsibly * * * direct" employees."[2] It is the Board's function to determine those who as a practical matter fall within the statutory definition[3] of "supervisor." N. L. R. B. v. Swift & Co., 292 F. 2d 561, 563, 1st Cir. (1961). Its finding is not undercut by the testimony relied on by the Company that they are not called supervisors, certainly not the testimony of the Company's president, and for that matter not the testimony of the employees involved since this merely falls into the groove of the titles used by the president. What is decisive is what the employees do rather than what they are called, and the evidence of what they do (see note 2) fully supports the Board's judgment that as a practical matter they are supervisors.

[4] 2. The election sought by the Union was held on September 14, 1967, and the Union won 19 to 6. On September 15, the Company began a series of temporary and permanent layoffs. As to certain employees production quotas were in-

2. Mary Burgher directed the work of other employees who worked with her, gave them job assignments, transferred them from job to job when necessary, gave them time off, and occasionally reprimanded them for poor work. Other employees testified that the Company president indicated when they were hired that Burgher would be their boss.

Gearing was told by the Company's president that he would be in charge of employees at the main plant and would have several other responsibilities of a clearly supervisory nature. Though the other employees were paid little more than the minimum wage, Gearing had a salary of $10,000 a year.

Hershey, the third employee in question, directed the employees in the plastics department, assigning their work and transferring them as necessary, and hired at least one employee.

3. Section 2(11) of the Act, 29 U. S. C. § 152(11), defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

creased. The Board found that the layoffs, discharges and changes in production quotas were discriminatorily motivated. We conclude that these findings are supported by substantial evidence.[4]

The layoffs began immediately after the election, which had results the Company considered adverse. The Company defends its actions on the ground that there was no work for the employees involved. No substantial business reasons were offered for the alleged lack of work or sudden change in amount of work available. There was substantial evidence that in particular cases the no-work claim was pure fabrication.

The Board's findings and orders with respect to post-election layoffs, discharges and changes in production quotas are affirmed.

---

4. The pattern of conduct shown by evidence credited by the Board is set out in the Board's opinion already cited. We see no need for detail on this point. It suffices to note:

The day after the election instead of keeping the doors open so that workers could enter, as before, whenever they arrived in the morning, the Company began the practice of keeping the doors locked until 7:45 a. m. and made the early arrivals wait outside.

The same morning the Union's election observer was deprived of work of winding hoses for shipment because a supervisor said they were defective. Yet there were 10-foot sections left from 25-foot hoses after 15-foot sections had been cut—and shipped. She was laid off again—ostensibly for lack of work. When she came to pick up her check the Company's president asked her for $50 he had provided when she was convalescing from an auto accident. She said she thought this was a gift. His reply: "It was at one time, but it isn't now." He added that she was "a very unappreciative employee."

As to several employees there was no reason for layoff except "lack of work," and no substantiation of this at hearing. When one worker came to pick up his check the president asked how he voted, and he admitted he voted for the Union. Said the president: "I know you did. I just wanted to see what you would say about it."

As to two employees whose previous norm had been 75 parts per day, the quota was raised to 125. One of them complained that a quota beyond 110 was not possible. She was told to produce 125 "or else." She had previously been told by the president: "You're making your bed, and I'll see that you pay for it." She worked to the end of the day and never returned to the plant.

B. *The Remedy Appropriate for the Patent Violation of Section 8(a)(5); Failure of the Board to Provide Satifactory Justification for Limiting Relief to Order To Cease from Further Violations*

[5] 1. The September 14 election resulted from an election petition that the Union had filed with the Board the previous August 1. On September 1, the parties entered into the usual agreement providing that disputes would be settled by the regional director of the Board, and that his decisions would be final. Shortly after the Union's 19-to-6 victory, the Company contested the results of the election, on the basis of Union distribution of a certain leaflet on election morning and also on the basis of a claim that three of those who voted were not entitled to vote. The leaflet was mildy worded.[5] The regional director determined that it did not affect the validity of the election. He further determined that whatever the merits of the claim that three voting employees should not have voted, the Union's 19-to-6 majority mooted the issue.[6] Accordingly, he certified the Union as the exclusive bargaining representative of the Company's employees.

On November 10, the Union's attorney wrote to the Company's president asking that the Company meet with the Union to begin collective bargaining. He requested various kinds of

5. The leaflet, entitled "Hold Everything!", said:

> Today is the day to vote for greater benefits. That is just exactly what a YES vote will mean. . . . Only you lose if you don't vote YES. You lose the right to have a say in your working conditions, you lose the right to have a say in how much money you make, you lose the right to have seniority, a pension plan, an insurance plan, improved vacations, more holidays, and above all, the right to gain individual dignity. Your future is at stake today. The only way to make sure you don't lose a profitable and sure future is by voting YES today. * * *

6. This ruling is manifestly sound. *See* Manning, Maxwell & Moore, Inc. v. N. L. R. B., 324 F. 2d 857 (5th Cir. 1963). It was not seriously contested on appeal.

information about the employees (names, wages, etc.), including any information that the Union "would need to bargain intelligently." Another letter was sent the same day to Harvey Rector, the Company's labor consultant, asking the Company to meet with the Union on November 15, or the earliest convenient date, to begin negotiations. No replies were received to either letter. On November 20, the Union's president wrote to Rector renewing his previous request for negotiations and information. Two days later Rector replied that the Company considered the Union's certification invalid because the Regional Director had "acted arbitrarily and capriciously" and denied the Company due process. Rector stated that he would not meet with the Union until all litigation was disposed of. Two later letters from the Union to the Company requesting bargaining and information were ignored.

[6] 2. The Company's refusal to bargain was a clear and flagrant violation of the law. Its objections to the election were patently frivolous, and violated the express terms of the Agreement for Consent Election, entered into with the Union only thirteen days before the election, to abide by the decision of the regional director. The Company gave not a hint of support or explanation for its claim that the regional director acted "arbitrarily and capriciously."

The Union contends that the Board's uses of its traditional "remedy"—a cease-and-desist order—for a case of such intransigence bountifully and improperly rewards the Company for its transgression, and cannot be maintained as a faithful performance of the Board's task "of devising remedies to effectuate the policies of the Act." N. L. R. B. v. Seven-Up Bottling Co., 344 U. S. 344, 346, 73 S. Ct. 287, 289, 97 L. Ed. 377 (1953).

[7] We conclude that the Union makes a substantial contention, and that the Board has not, on the record before us, provided a satisfactory justification for its order.

Section 10(c) of the Act, 29 U. S. C. § 160(c), requires the Board "to take such affirmative action * * * as will effectuate the policies of this subchapter."

The broad scope of the Board's function has been noted by the Supreme Court. An illuminating precedent is Fibreboard Paper Prods. Corp. v. N. L. R. B., 379 U. S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964), where the Supreme Court approved a Board order which awarded back pay on the basis of a contract no longer in effect. The Board determined, and the Court agreed, that the employer's unilateral action in subcontracting the work, which destroyed the jobs of his employees, violated his duty to bargain with the union. Though the contract was no longer in effect, the Board reinstated its terms. The Court upheld the Board's conclusion that this action "to insure meaningful bargaining" is well designed to promote the policies of the Act. As to the burden on the employer, the Court said, simply: "Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company." (379 U. S. at 216, 85 S. Ct. at 406)

[8] The "affirmative action" clause of § 10(c) is not a mere charter of authority that the Board has the option to exercise or ignore. It is, as the Court has recently stated, a "broad command." N. L. R. B. v. J. H. Rutter-Rex Mfg. Co., 396 U. S. 258, 90 S. Ct. 417, 24 L. Ed. 2d 405 (1969).

[9-11] We cannot discern, and the Board has not explained, on what basis it could or did conclude that its order under review is designed "to insure meaningful bargaining." Counsel for the Board tells us that the prospective order to bargain entered in this case is what is conventionally entered by the Board. Assuming the general validity of a purely prospective type of order, the case of brazen refusal to bargain, in violation of solemn obligations, presents special considerations. While such remedy may provide some bargaining from the date of the order's enforcement, it operates in a real sense so as to

be counter-productive and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant. The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace, N. L. R. B. v. American Natl. Ins. Co., 343 U. S. 395, 404, 72 S. Ct. 824, 96 L. Ed. 1027 (1952). "*Enforcement* of the obligation to bargain collectively is crucial to the statutory scheme," id. at 402, 72 S. Ct. at 822 (emphasis added). Yet a prospective-only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit. Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the "fruits of its violation." Montgomery Ward & Co. v. N. L. R. B., 339 F. 2d 889, 894 (6th Cir. 1965). "Effectuation of the Act's policies * * * requires that the employees whose statutory rights were invaded by reason of the Respondent's unlawful * * * action, and who may have suffered losses in consequence thereof, be reimbursed for such loses until such time as the Respondent remedies its violation by doing what it should have done in the first place." Winn-Dixie Stores, Inc., 147 N. L. R. B. 788, 792, aff'd in pertinent part, 361 F. 2d 512 (5th Cir. 1966).

Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. *See* Ross, Analysis of Administrative Process Under Taft-Hartley, 1966 Labor Relations Yearbook 299, 302-03; Note, An Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases, 67 Mich. L. Rev. 374, 378 (1968). Thus the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.

Not only furtherance of national labor policy but also important considerations of judicial administration are involved. Simply put, the present posture of the Board encourages frivolous litigation not only before the Board, but in the reviewing courts. The case at hand is in point. The position of the Company is palpably without merit with respect to its refusal to bargain. Yet it profited through the delay that review entails: all during this litigation it has not had to bargain collectively over wages or other financial aspects of employment.

The courts, then, are doubly concerned when Board inadequacies drain and divert judicial resources from the provision of justice to the crowded calendars and to meritorious litigants whose claims clamor for attention. The same considerations are presumably applicable at the administrative level.

[12] There is a presumption that favors the Board, with its expertise, in its selection of remedies. Fibreboard Paper Prods. Corp. v. N. L. R. B., *supra*. *See also* Consolo v. FMC, 383 U. S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). That presumption is given full effect when the Board makes a conscious selection of remedies to effectuate the Act, provided reasons for its conclusion are stated or may fairly be discerned. That is not the situation in the case before us. The Board's silence on a substantial question raised by the Union is not sanctified by the circumstances that it was being passive rather than affirmative.

That indeed seems to be the misguided assumption of the Board—that it is not subject to disapprobation if it is only doing the same as it has done before. The Examiner declined to award further relief to the Union on the ground that no such step had yet been authorized by the Board. Whatever merit in administrative terms may attach to this course at the Examiner level can hardly be adduced as justification for the Board's announcement in its decision that it was continuing the order drafted by the Examiner for the reasons stated by him. This kind of circularity hardly sustains an agency's disposition of a serious question.

We are aware that some aspects of the matter were argued to the Board some time ago in cases still not decided.[7] If it be assumed *pro tem* that there are considerations precluding development of a truly meaningful remedy in cases where the employer's failure to bargain rested on a debatable question, this would not preclude a meaningful remedy for a manifestly unjustifiable refusal to bargain like that involved in the case at bar.[8]

[13] The Board's assumption seems to be that application of a uniform remedy stills all legal doubts. But it is as old in philosophy at least as Aristotle, and it is settled in the law as well,[9] that the application of an apparently uniform rule may in reality engender unfair discrimination when like measures are applied to unlike cases.

Nor must it be assumed that the grievances in the wake of abuses like those before us are solely those of the Union. There are grievances, too, that are felt by employers who have fulfilled their legal obligation to bargain, especially if they are competitors.

---

7. Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967); Herman Wilson Lumber Co., Case No. 26-CA-2536 (TXD rendered Jan. 4, 1967); Zinke's Foods, Inc., Case No. 30-CA-372 (TXD rendered Dec. 18, 1966).

8. St. Antoine, A Touchstone for Labor Board Remedies, 14 Wayne L. Rev., 1039, 1043 (1968).

The author also notes (see page 1042) that a make-whole order, being not only compensatory but also one that "can be shown to have a rational relation to the particular violation found" is not subject to interdiction as a purely "penal" remedy. The vitality of the "penal" objection is also undercut by the Supreme Court's recent decision in N. L. R. B. v. J. H. Rutter-Rex Mfg. Co., Inc., 396 U. S. at 265, 90 S. Ct. at 421 (1969): "But the Board could properly conclude that backpay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act."

9. Green v. County School Bd. of New Kent Cty., 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968); Griffin v. Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); Yu Cong Eng v. Trinidad, 271 U. S. 500, 46 S. Ct. 619, 70 L. Ed. 1059 (1926).

We would not cavil with the Board's course if it appeared that no further action could lawfully be taken by the Board. But we see no basis for such a claim. There may be difficulties in one of the proposals offered by the Union in this case: that the Company be ordered to pay dues, for the pay period "lost" to the employees by virtue of the Company's violation, to the union they selected as their agent. We are in no position to gainsay the possibility that an agency might reject the proposal for reasons of sound administrative policy. And any such proposals would have to be shaped to take into account legal considerations.[10]

But even if the Board declines to take the steps advocated by the Union, it may conclude that some other remedies will at least do something to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation.[11]

[14] In reaching its conclusion on appropriate remedies and the extent to which it can base them on probable employer-employee relationships, the Board may properly take into account the doctrine of N. L. R. B. v. Mooney Aircraft, Inc., 375 F. 2d 402 (5th Cir.), cert. denied, 389 U. S. 859, 88 S. Ct. 104, 19 L. Ed. 2d 125 (1967), wherein enforcement was granted to the Board's back pay order at higher wages than the employee had been making prior to his discharge, because the Board had concluded that the employee probably would have been promoted.

[15] A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in quantifying appropriate compensation as a

10. Since the dues and initiation fees would have come from the employees' pockets and not from the Company, any assessment of these charges against the Company would have to be subtracted from back pay awards. This would avoid the legal problem of a Board order awarding more than back pay.

11. Thus, other unions have recommended, for example, assessment of costs of litigation.

justification for withdrawal and frustration of the policy, particularly where such an approach would operate only to reward the wrongdoer and to give him an advantage over a law-abiding competitor. Pertinent doctrine was stated thus in Bigelow v. RKO Radio Pictures, 327 U. S. 251, 264-65, 66 S. Ct. 574, 579-580, 90 L. Ed. 652 (1946):

> In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. * * * Any other rule would enable the wrongdoer to profitby his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * That principle is an ancient one, Amory v. Delamirie, I Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application.

The Supreme Court has recently pointed out the propriety, within the national labor policy, of putting on the wrong-doing employer the burden of compensating employees for the loss suffered during a period of unusual Board delay, a delay that the employer might with reason have failed to contemplate.[12]

This principle has added force in a case, like the one before us, where the delay in requiring the Company to conform to

12. *See* N. L. R. B. v. J. Rutter-Rex Mfg. Co., *supra:*
Either the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees.

the law was not unusual in extent, was of benefit to the Company from its viewpoint, and was in fact sought by the Company.

[16] The power to accord some meaningful make-whole relief is not necessarily undercut by the provision in section 8(d) of the Act that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." In this case the refusal to bargain is clear and unmistakable, and there is not the slightest suggestion that a refusal to make a concession might be identified as a refusal to bargain collectively. The Board cannot be faulted on the ground that it is imposing contract terms upon an unwilling employer when it is engaged only in a determination of a means of calculating a remedy to compensate for injury sustained from an unfair (and unlawful) labor practice. This is not mere playing with words. We are in accord with the view of a careful student of this field of law who points out that no one would suggest that the award of damages in an antitrust suit would constitute the imposition of contract terms even if the calculation of reasonable and probable damages took into account a conclusion as to business opportunities denied, based on an appraisal of an agreement the parties probably would have realized but for the defendant's illegal acts. *See* St. Antoine, A Touchstone for Labor Remedies, 14 Wayne L. Rev. 1039, 1053 (1968). Let us consider a more homely analogy: Suppose an employer assault and incapacitates someone who is working as a store clerk while finishing engineering school. Certainly a court would not be debarred from considering evidence indicating that in due course the clerk would likely have been employed as an engineer merely because the employer was under no contract requirement to employ him on that basis. Similarly the make-whole remedy —which could be measured not by any sentiment as to what the parties *should* have agreed to, but only as a determination, on the basis of all the evidence available, of what it is likely the parties *would* have agreed to—provides money compensation as

a remedy for past wrongs. Combined with the traditional remedy, it imposes no present or future contract obligations, and operates as to the future not by assuring the employees any right to certain terms, but only by requiring for the future what could not be provided for the past, *i.e.*, collective bargaining as required by the law. This approach is not forbidden by section 8(d) of the Act.[13]

No serious objection may be lodged against the make-whole relief because it adds elements of novelty to the Board's lexicon of orders. In the pithy words of Judge, now Chief Justice Burger: "In the evolution of the law of remedies some things are bound to happen for the 'first time.' "[14]

We have given careful consideration to the recent decision in H. K. Porter Co., Inc. v. N. L. R. B., 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970). In *Porter* the Supreme Court

13. This conclusion is further supported by cases like *Fibreboard, supra,* and *Mooney Aircraft, supra.* In those cases the courts upheld a remedy which was permissible under section 10 even though the Board justified the reasonableness of the technique by noting that it was a continuation of an existing agreement that probably would have been entered into. The permissibility of the order under section 10 of the Act is not obviated by the employer's failure to include the pertinent provision in the terms of a pending agreement. Cf. N. L. R. B. v. Strong, 393 U. S. 357, 89 S. Ct. 541, 21 L. Ed. 2d 546 (1969), holding that the prohibition against the Board's undertaking to enforce the provisions of a labor contract does not bar it from ordering back pay and fringe benefits agreed to by an employer in a contract he subsequently declined to sign, since the order was valid under section 10 as a remedy for an unfair labor practice.

As to various objections that a make-whole remedy is impractical, they rest either on the difficulty of assessing damages, a matter that is not controlling as our discussion above (pp. 1251, 1252) indicates, or else relate to policy considerations that are for assessment by the Board in the first instance.

14. International Broth. of Operative Potters v. N. L. R. B., 116 U. S. App. D. C. 35, 39, 320 F. 2d 757, 761 (1963). The opinion approves the award of interest as well as back pay, and overrides the objection that this has punitive aspects since the obligation is public, pointing out that the award of interest effectuates the Act as "plainly in the direction of making the employee whole." *Id.*

ruled that the Act puts a limitation on the permissible scope of a Board's order, even where the employer has in bad faith refused to bargain. The Court did not recede from, indeed it expressly reiterated, the principle that the "Board's remedial powers under § 10 of the Act are broad." But it held that they were not so broad as to override the specific provision and policy of the Act which forbids the Board from "compel[ling] agreement when the parties themselves are unable to agree." 397 U. S. at 108, 90 S. Ct. at 826. We have had this principle firmly in mind throughout our consideration, and have not proceeded on the assumption that the case at bar might justify a qualification of that principle. We in no way suggest either that the Board can compel agreement or that the make-whole remedy as appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act. It is not within the scope of our remand for the Board to measure the amount of damages by reference to any contract term which could have been brought about only through a mandate to the employer not merely to engage in the process of collective bargaining but also to agree on a contract provision.

[17] We reiterate that damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer has not yet entered into the contract. Fibreboard Paper Prods. Corp. v. N. L. R. B., *supra;* N. L. R. B. v. Mooney Aircraft, Inc., *supra.*

The Union has asked for remand to the Board for further consideration of the make-whole claim (while the remainder of the Board's order is enforced). We think this is sound. In view of the interest of judicial administration, including the impact on

court dockets, we accompany our remand with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief, in whole or in part. If the Board believes that alternative remedies,[15] beyond those already granted, are more appropriate, it should so state. The assessment of these matters is for the Board.

The Board's application for enforcement of the order as issued is granted. On the Union's petition for review, the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

MACKINNON, *Circuit Judge* (concurring in part and dissenting in part):

The majority opinion remands the case involving the Union's petition for review for further proceedings by the Board to consider the Union's request of their so-called "make-whole claim." With respect to this Union request, the majority opinion says, "We think this is sound," but admits "There may be difficulties in one [only one?] of the proposals offered by the Union in this case: that the Company be ordered to pay [Union] dues, for the pay period 'lost' to the employees by virtue of the Company's violation * * *." (1251). In evaluating what is involved in the remand ordered by the majority the entire Union request for so-called "remedial relief" must be considered.

The Trial Examiner refused to recommend the remedial relief requested by the Union and the Board affirmed his findings and recommendation by denying the Union's request in its entirety. The Union request for additional relief as set forth in its brief to this court follows:

---

15. The scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these.

In support of its request for compensatory relief to maintain the *status quo ante* pending compliance by the Company of its duty to bargain collectively, the Union adduced competent and uncontested testimony (TDX 18; Tr. 494-497, 509-510) that a contract would have been consummated within seventy-five (75) to one hundred (100) days of the Union's November 8 certification (Tr. 498-500). A complete contract proposal (GC Exhibits 13 and 14) was submitted and received by the Company which requested an immediate wage increase of fifteen (15) cents per hour followed by a further wage increase of twenty (20) cents per hour as of February 1, 1968, when the minimum lawful rate of one dollar and sixty cents ($1.60) per hour became compulsory under the Fair Labor Standards Act. These wage increases would merely establish a rate of fifteen (15) cents per hour above the minimum statutory rate, a level of compensation considerably below the prevailing area wages paid to comparable employees for similar work (C. P. Exhibits 1, 2, 3 and 4; Tr. 505-507).

In the foregoing premises the Union requested that minimal compensatory relief be computed and awarded by the Board, as follows:

> 1. that the Company pay at least fifteen (15) cents an hour to its employees as of such date a contract would have been executed.
>
> 2. that in addition to the rate established pursuant to '1' above, the Company pay its employees cost-of-living increases of one (1) cent per hour for each 0.4 increase in the Consumer's Price Index published by the United States Department of Labor (1957-1959 equal a base period of 100).

The Union also established that the prevailing contract practice in the area by employers comparable with the Company was to include a union security clause in such

> contracts that are negotiated (Tr. 498). In this premise, coupled with the nineteen (19) 'yes' votes that were recorded for the Union in the representation election, the Union requested the Board to direct the Company to pay the Union an amount equal to such dues and initiation fees that would have been realized beginning March 18, 1969, the date that a union security provision would have been in force and effect as part of a contract negotiated following the Union's certification. In computing such amount, the Union requested that said amount be established on a minimum basis of nineteen (19) employees and with such additional employees as are evidenced by written bargaining authorizations secured since the certification of the Union.

The Union's petition thus requests that an order issue requiring the Company to make payments to the Union and its employees based on the premise that a contract would have been consummated within 75 to 100 days of the Union's November 8th certification providing for pay raises to all employees of 15¢ per hour plus a certain cost of living increase and including an amount as dues and initiation fees for 19 employees[1] that voted for the Union on the assumption that the contract would have been executed with a "union security clause" (checkoff), such dues and fees to begin on March 18, 1969.

At the outset I note that the adequacy of the Board's remedies in unfair labor practice cases is currently being debated. As the Trial Examiner in this case stated:

> The Union's request for this type of an expanded remedy represents the views of a growing body of respectable authority who take the position that the Board's current policy and practice in remedying this type of unlawful refusal to bargain is neither adequate nor realistic. There is currently pending before the Board at the present time two

1. Plus any additional employees that might sign written bargaining authorizations.

> cases in which such a request is being considered (*Zinke's Foods,* Case 30-CA-372 and *Ex-Cello-O-Corp.,* Case 25-CA-2377). In each of these cases the Board has received oral argument on the question of an adequate remedy, but has not, as yet, rendered its decision.

See also St. Antoine, A Touchstone for Labor Remedies, 14 Wayne L. Rev. 1039 (1968).

However, at least some of the questions that have been raised have recently been answered by the Supreme Court in H. K. Porter Co. v. N. L. R. B., 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970). In that case, the Supreme Court reversed and remanded to this court an order of the N. L. R. B. issued after an opinion by a panel of this court required an employer to

> "[g]rant to the Union a contract clause providing for the checkoff of Union dues." 172 N. L. R. B. No. 72, aff'd, H. K. Porter Co. v. N. L. R. B., 134 U. S. App. D. C. 227, 414 F. 2d 1123 (1969).

The Court held that the Board was without power to "compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." H. K. Porter Co. v. N. L. R. B., *supra,* 397 U. S. at 102. In reaching this decision, Justice Black reviewed the relevant legislative and judicial history of labor relations in this country. His historical analysis makes it "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' N. L. R. B. v. American Ins. Co., 343 U. S. 395, 404, 72 S. Ct. 824, 829, 96 L. Ed. 1027 (1952)." H. K. Porter Co. v. N. L. R. B. *supra,* 397 U. S. at 106. *See also* Cap Santa Vue, Inc. v. N. L. R. B., 137 U. S. App. D. C. ....., 424 F. 2d 883 (1970) where a similar conclusion based on this legislative and judicial history was reached.

In my opinion the history of the Act thus makes it clear that the policy behind the Act is to rely on collective bargaining and

to avoid compulsory arbitration. Heretofore it had been generally considered that this was the position of labor and management. At labor's request, were we now to empower the Board to write labor contracts on wages and union security, the time may well come when labor would be dissatisfied with a governmental board exercising such power. The character of the Board is subject to constant change and considerable wisdom may have been exercised in restricting its power in the contractual area.

With these principles in mind, I turn to the instant case. The majority holds that "damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer has not yet entered into the contract. * * *" Fibreboard Paper Prods. Corp. v. N. L. R. B., 379 U. S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964), and N. L. R. B. v. Mooney Aircraft, Inc., 375 F. 2d 402 (5th Cir.), cert. denied, 389 U. S. 859, 88 S. Ct. 104, 19 L. Ed. 2d 125 (1967), are cited in support of this proposition. In the *Fibreboard* case, the unfair labor practice was the failure of the employer to negotiate with his employees the subcontracting out of certain work which had previously been performed by them. The effect of this unfair labor practice was to permit the employer to subcontract out the work in question without giving his employees a chance to negotiate the point. The Board ordered the original contract reinstated and the Court affirmed. It could be argued that no other remedy would have been adequate in the circumstances of the case. To reinstate the contract was simply to put the parties back in the last legal position they occupied. The Court did not hold that the contract must continue after the parties negotiated and thus it did not attempt to dictate a substantive term of the contract. This case does not provide authority for the step the majority takes in the instant case.

In the *Mooney Aircraft* case, the Fifth Circuit upheld a back-pay order which included an amount the wrongfully-discharged employee would "in all probability" have received as a pay raise

had he not been discharged. The decision must be read in light of the fact that the failure of the employer to grant the pay raise was in itself wrongful and discriminatory. The court was of the opinion that "[t]he relief granted was therefore necessary to extinguish the effects of the discrimination." N. L. R. B. v. Mooney Aircraft, Inc., *supra*, 375 F. 2d at 403. Thus the remedy both in the *Fibreboard* and *Mooney Aircraft* cases was based on pre-existing contract rights. They are scarcely authority for the proposition that the Board may in effect write a contract where one did not exist before, and then base its remedy on the contract it has written.

The majority cautions that the "make-whole" remedy "could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely the parties *would* have agreed to * * *." The Board, according to the majority opinion, is thus required to determine what the parties would have agreed to if they had bargained. However, if any prediction were to be made, the history of this case seems to make it clear that the most realistic prediction would be that the parties would not have agreed to anything. Any other conclusion is difficult to reach in light of the Company president's "antiunion animus" and the "patently frivolous" objections to the election. In my opinion, the Board is thus necessarily relegated to a determination of what the parties *should* have agreed to had they bargained. In time, such power may well prove dangerous both to unions and to employers.

But this is not the greatest problem I have with the majority opinion. Even if the Board could somehow predict what the parties would have agreed to, the wrong is still that any such process would require the Board to determine a "substantive contractual provision." That the Board acts in the past rather than the present does not, in my opinion, eliminate the prohibition in this respect of H. K. Porter Co. v. N. L. R. B., *supra*. In that case, Justice Black concluded:

> It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process. H. K. Porter Co. v. N. L. R. B. *supra*, 397 U. S. at 109, 90 S. Ct. at 826.

The power the majority opinion seeks to have the Board apply has been expressly withheld by Congress. 1 Legislative History of the Labor Management Relations Act, 1947, pp. 310, 538. In the language of the House Conference Report No. 510 on H. R. 3070, 80th Congress,

> "This mutual obligation (to engage in collective bargaining) was not to compel either party to agree to a proposal or require the making of a concession." p. 538.

The fundamental error of the majority opinion is thus that it would authorize damages on the likelihood that certain results would be reached that the Act provides are not required to be reached. Here, the cause of the alleged damage for which the Union requests reimbursement is actually the refusal of the Company to agree to a contract (not the failure to bargain collectively) but no damages can be assessed therefor because there is no legal duty upon either party to agree upon a contract. Thus, even assuming a failure to *bargain*, the damages here are not being assessed on that basis but upon a failure to *agree*, which is not a duty imposed on either party, and a failure to agree upon a specific result, which is entirely speculative.

I would accordingly affirm the Board's order in No. 22911 and deny the Union's petition in No. 22797.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TIDEE PRODUCTS, INC.,

Respondent.

Nos. 23209, 23321.

UNITED STATES COURT OF APPEALS,
District of Columbia Circuit.

Argued Sept. 21, 1970.

Decided Dec. 23, 1970.

Proceeding on petition for review and application for enforcement of order of National Labor Relations Board. The Court of Appeals held that evidence sustained Board's finding that employer had engaged in unfair labor practices and had invoked disciplinary measures which were motivated by desire to punish workers for pro-union activity.

Enforcement granted and petition for review remanded.

MACKINNON, *Circuit Judge,* concurred in part, dissented in part, and filed opinion.

Labor Relations 555, 556

Evidence sustained Board's finding that employer had engaged in unfair labor practices and had invoked disciplinary measures which were motivated by desire to punish workers for prounion activity. National Labor Relations Act, § 8(a) (1, 3-5) as amended 29 U. S. C. A. § 158(a) (1, 3-5).

Mr. Melvin Warshaw, Washington, D. C., with whom Mr. Irving Abramson and Mrs. Ruth Weyland, Washington, D. C., were on the brief, for petitioner in No. 23,209.

Mrs. Corinna Metcalf, Attorney, National Labor Relations Board, with whom Messrs. Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, National Labor Relations Board, were on the brief, for petitioner in No. 23,321 and respondent in No. 23,209.

Mr. Roy E. Browne, Akron, Ohio, for respondent in No. 23,321.

Before LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges.*

PER CURIAM:

This case is before us on the petition of the International Union of Electrical, Radio & Machine Workers, AFL-CIO, to review, and application of the National Labor Relations Board to enforce, a Board order issued against Tiidee Products, Inc. on June 29, 1969. 176 NLRB No. 133, 1969 CCH NLRB Dec. ¶ 20,795.

This is the second time within the year that Tiidee has been before this court on charges of unfair labor practice by the Board. See IUERMW [Tiidee Products] v. NLRB, 138 U. S. App. D. C. 249, 429 F. 2d 1243, cert. denied, 400 U. S. 950,

91 S. Ct. 239, 27 L. Ed. 2d 256 (1970). The instant charges resulted from a series of actions taken by the Company, through its president Irving Hollander, immediately following the Board's hearing in the prior case. These included the promulgation of no-soliciation and no-distribution rules, the unilateral adoption of comprehensive work rules, and the interrogation and discharge of certain employees for what the Board found to be sympathy with the union. Because of these actions, the Board concluded that the Company had violated Section 8(a) (1), (3), (4), and (5) of the Act. We have given careful consideration to the arguments on which the Company bases its challenge to the Board's findings, including the assertion that the Company's actions against specific employees were justified by considerations of economy and efficiency. We conclude, however, that the findings of the Board are supported by substantial evidence of record. There was ample evidence from which the Board could reasonably conclude that the disciplinary measures invoked by Hollander were motivated by his desire to punish workers for pro-union activity.

The Board's application for enforcement of the order as issued is granted. As to the Union's petition for review, the case is remanded to the Board for further consideration of the make-whole claim in light of our April 3 decision in *Tildee I*.

So ordered.

MACKINNON, *Circuit Judge* (concurring in part and dissenting in part):

I concur in the conclusion that the findings of the Board are sustained by satisfactory evidence, however I dissent as to the remand for further consideration by the Board as to the make-whole claim requested by the Union by way of additional remedial relief. First, the Board already has ample power under the remand by the majority in *Tiidee I* to grant all necessary remedial relief that is requested here; and secondly, in my opinion, this is not as strong a case as *Tiidee I* for the make-whole relief requested as there is not present here any general refusal to recognize and bargain with the certified union. In my view, the majority are remanding the case here on the remedial relief question principally because of the cumulative effect of the facts here when same are considered jointly with those in *Tiidee I*. I view this case strictly and solely on its own facts and would also affirm the Board's denial of further remedial relief.

RELEVANT STATUTORY SECTION:

29 U. S. C. § 160(c)

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [§§ 151-158, 159-168 of this title]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. a. In its original decision in *Tiidee I*[1], the Board found that the Company, in resisting the organizational drive of the International Union of

---

[1]Two Board decisions, hereafter *Tiidee I* and *Tiidee II*, were consolidated for purposes of review in the court of appeals.

Electrical, Radio and Machine Workers, AFL-CIO, at its Dayton, Ohio, plant, violated Section 8(a)(1) and (3) of the National Labor Relations Act by interrogating employees about their union activities, by raising production quotas, and by discharging and laying off certain employees because of their support for the Union. The Board also found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which had been certified by the Board as the representative of its employees following a Board-conducted election, and by refusing to supply the Union with requested information necessary for it to bargain intelligently (Pet. App. 34-35).[2] The Board ordered the Company, *inter alia,* to cease and desist from the unfair labor practices found, to reinstate the discharged employees, and to bargain with the Union (Pet. App. 38-44). The Board declined the Union's request for broader remedial relief (Pet. App. 37-38, 45-46).[3] The court of appeals enforced the Board's order, but remanded the case to the Board for further consideration of the Union's request for additional relief (Pet. App. 110-131).

---

[2]"Pet. App." refers to the appendix to the petition in No. 73-1180.

[3]The Union requested, *inter alia,* that the Company make the employees whole for wages and other benefits which they might have received but for the Company's unlawful refusal to bargain, and pay the Union the amount of dues and initiation fees it lost as a result of that refusal.

b. On the remand, the Board granted some of the additional relief requested by the Union, including the requirement that the Company reimburse the Board and the Union for litigation expenses, including attorneys' fees (Pet. App. 90-92). The Board noted that, in *Heck's, Inc.*, 191 NLRB 886, 889,[4] it had ruled that normally litigation expenses are not recoverable in a Board proceeding. It concluded that a departure from this rule was warranted in the case of "frivolous litigation such as this is", since the "policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available" (Pet. App. 90-91).

The Board denied the Union's request to make the employees whole for monetary losses suffered as a result of the Company's unlawful refusal to bargain (the "make-whole" remedy). Accepting as the "law of the case" the view of the court of appeals that the Board has authority to grant such remedy (Pet. App. 85), the Board concluded that it would not be "practicable" to do so in light of "the record herein." The Board found that the record provided "no way by which the Board could ascertain with even approximate accuracy * * * what the parties '*would* have agreed to' if they had bargained in good faith." (Pet. App. 87, emphasis in original.) The Board added that it would "further delay the commencement of meaningful collective bargaining" to remand the case to a Trial Examiner for a hearing to devise a " 'make-whole' formula for backpay to be awarded employees, if any." For, the Company, "which is under order to bargain with the Union, is not likely to

---

[4]This case is before the Court in *National Labor Relations Board* v. *Food Store Employees Union, Local* 347, No. 73-370.

agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain" (Pet. App. 87-88).

Thereafter, in *Tiidee II,* which involves further unfair labor practices committed by the Company after the events covered in *Tiidee I,* the Board followed the same course. It awarded litigation expenses, but declined the Union's request for a make-whole remedy (Pet. App. 101-102).

c. Petitions to review the Board's supplemental orders in *Tiidee I* and *II* were filed in the court of appeals by both the Company and the Union, and the Board filed a cross-petition for enforcement of those orders. The Company contested the orders on the ground, *inter alia,* that the Board lacks statutory authority to award litigation expenses even in frivolous cases. The Union challenged the Board's action in refusing to provide the make-whole and other remedies which it requested. The court of appeals heard argument in the cases on September 24, 1973, and they are awaiting its decision.

2. In No. 73-1180, the Company, in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals—*i.e.,* whether Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board to order a respondent to reimburse the Board and the charging party for expenses incurred in the investigation, preparation, and conduct of an unfair labor practice case (Pet. 3).[5] In No. 73-1423, the Union, like-

[5]The Company also seeks to present the further question whether, assuming the existence of such power, the Board was reasonable in awarding litigation expenses subsequent to the date when the Company offered to comply with its obligations under the Act (Pet. 3).

wise in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals— *i.e.,* whether the Board has power to make the employees whole for losses suffered as a result of an unlawful refusal to bargain with their union representative (Pet. 3).[6]

The issues presented by the petitions are not "* * * of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court" prior to judgment in the court of appeals. Rule 20 of the Rules of this Court.[7] The question the Company raises—whether the Board has power to award litigation expenses—was not raised by either the Board or the Union in this Court in *National Labor Relations Board* v. *Food Store Employees Union, Local 347,* No. 73-370, argued March 18-19, 1974, and therefore is not properly before the Court in that case. See the Board's supplemental brief in that case, pp. 1-5. Moreover, *Tiidee I* and *II* were argued in the court of appeals on September 24, 1973 and that court may be holding its decision pending this Court's decision in *Food Store*

---

[6]The Union also seeks to present these further questions: (1) whether, assuming that the Board has power to provide a make-whole remedy, it abused its discretion in failing to order it here; (2) whether it erred in failing to reimburse the Union for the initiation fees and dues which it could have collected upon the signing of an agreement by the Company; and (3) whether the Board erred in failing to reimburse the Union for excess organizational expenses (Pet. 3-4).

[7]The power of this Court to review determinations of administrative agencies before judgment in the court of appeals has never been definitively settled. See Stern and Gressman, *Supreme Court Practice,* pp. 28-30 (4th ed. 1969). Although we believe it has that power, for the reasons given in the text this would not be an appropriate occasion to exercise it.

Employees. Although the issue of Board power is not presented therein, this Court's opinion in *Food Store Employees* may nonetheless provide some guidance to the court of appeals on that issue, and that court should be afforded an opportunity to consider the *Tiidee* cases in light of this Court's opinion.

The Union, agreeing that the issue presented by the Company should be reviewed by this Court, has filed a petition asking this Court to review "the whole issue of power to remedy a frivolously based refusal to bargain" (Pet. 17), including the Board's power to grant a "make-whole" remedy. As indicated above, review of the issue presented by the Company is not warranted. Moreover, the general issue stated by the Union's petition is not presented in these cases. The court of appeals assumed that the Board had the power to grant the remedies requested by the Union, and left it to the Board to decide which were appropriate (Pet. App. 124-125); the sole question before that court is whether the Board's order on remand complies with the court's earlier decision. That is an issue on which it is particularly appropriate that the court of appeals speak first, and indeed one which, ordinarily, this Court would not review.

In short, neither the petition of the Company nor that of the Union warrants by-passing the normal appellate procedure of court of appeals review of agency determinations.

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1974.

MAR 29 1974

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari Before Judgment to The United States Court of Appeals for the District of Columbia Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER TIIDEE PRODUCTS, INC. AND BRIEF AMICUS CURIAE

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
The Chamber of Commerce of the United States of America,
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684

Attorneys for the Amicus Curiae

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari Before Judgment to The United States Court of Appeals for the District of Columbia Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER TIIDEE PRODUCTS, INC.

The Chamber of Commerce of the United States of America respectfully requests leave to file a brief *amicus*

curiae in support of the position of the Petitioner. In support of this motion the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 3,000,000 business firms. It is the largest association of business and professional organizations in the United States. One of the Chamber's principal functions is the representation of its members' views in important labor relations litigation affecting their vital and legitimate interests.

2. The essential question presented in this case is whether the Board has the statutory power to assess litigation expenses and organizational costs to an unsuccessful respondent in a Board proceeding. Because many of the Chamber's members might be subject to substantial attorneys' fees and organizational costs under the decision of the court below, the propriety of the Board or a court assessing such costs is a matter of substantial concern to the Chamber.

3. The question at issue here thus transcends the interest of the particular parties involved and affects the interests of every litigant who is now or will in the future appear before the Board. Further, apart from its major practical impact upon all Board litigants, the question presented here involves a most important aspect of the Board's remedial power under the National Labor Relations Act and the fulfilment of the Congress' objectives in enacting this legislation. That question is thus worthy of the fullest exposition of all parties' views. In similar circumstances this Court has permitted the Chamber to file briefs *amicus curiae*. See, *e.g.*, *N.L.R.B.* v. *H. K. Porter*, 397 U.S. 99 (1970); and *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). For these reasons, the Chamber respectfully requests leave to submit the attached brief.

Respectfully submitted,

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
The Chamber of
Commerce of the
United States of
America,
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684

Attorneys for the
Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari Before Judgment to The United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER TIIDEE PRODUCTS, INC.

Interest of the Amicus Curiae

The interest of the Chamber is set forth in its foregoing motion for leave to file a brief amicus curiae.

ARGUMENT

A. The Petition for Writ of Certiorari Should Be Granted And Should Be Consolidated For Argument With *National Labor Relations Board* v. *Food Store Employees Union, etc.* ("Heck's").

There are now pending before this Court two related cases raising in common a fundamental question concerning the Board's remedial powers under the National Labor Relations Act. These consist of *National Labor Relations Board* v. *Food Store Employees Union, etc.* (No. 73-370) and the instant case. The former, which was recently orally argued before this Court, involved the propriety, under the Act, of an order to the Employer, Heck's, Inc., to reimburse a union for its litigation and organizational costs and the Board for its legal costs. In that case (herein called the *Heck's* case), the Board and the union both assumed the existence of the Board's authority under the Act to award such costs. These parties differed only with respect to the propriety of such an award in that case and the authority of a reviewing court to reverse the Board's exercise of discretion in that regard. Heck's, the Employer in the case, argued,[1] however, that the Board lacked the power to impose such costs, that a court could not therefore require the Board to impose them and that the issue of the existence of that power was a necessary threshhold question which, as a matter of logic and judicial economy, required decision as a part of this Court's deliberations. The Chamber's brief, *amicus curiae*, in the Heck's case sought to sup-

[1] This point was urged in Heck's briefs to the Court. Heck's further request for leave to participate in oral argument in order to pursue its views was denied by this Court. The argument as to Heck's ultimate liability for the subject costs thus proceeded without its participation.

port the view that the Board lacked power under its statute to award litigation and organizational costs.[2]

The instant case is before this Court on petition for certiorari before judgment below because it involves precisely the issue which Heck's sought to raise in its own previously pending case. Indeed, the cases come here from the same lower court, involve the same judicial effort to restructure administrative remedies and are a product of the application by the Board of the same remedial principles. Moreover, the lower court had at one point remanded the Heck's case for reconsideration by the Board in light of that court's earlier decision in the instant case. The Board's holding in both cases resulted from the rationale expressed by the lower court in its first decision in this case. The two cases differ only in that the petition for certiorari herein specifically raises the question of the Board's power which underlies but was not expressly stated in the Board's petition in *Heck's*.

Accordingly, the two cases are inextricably interrelated and present this Court with differing factual contexts for the same challenged exercise of administrative power.[3]

Under these circumstances, this Court is urged to grant the instant petition for certiorari before judgment and to rule on the question of the Board's statutory power,

---

[2] The Chamber's brief was not accepted by the Court. The union had opposed the filing of this brief solely on the ground that the matters which it discussed were not raised in the Board's petition for certiorari and were thus not before the Court. The union's contemporaneous motion to strike Heck's brief for the same reason remains pending.

[3] The factual differences in the two cases led the Board to impose extraordinary costs here but not in *Heck's*. The Board claims that it possesses the discretion to impose these costs where it deems the facts to warrant such relief. Heck's and the petitioner herein contend, however, that the Board can have no discretion where it lacks statutory power or authority.

both as sought here and by Heck's. Inasmuch as the aggrieved Employer was not heard on this issue in Heck's, it appears appropriate that the decision in that case be limited to the general question of a reviewing court's authority to substitute its remedial views for that of the Board, and without addressing the merits of the particular remedy involved both there and here. Such a result would permit this Court to consider that remedy in this case, in which Heck's, as well as the parties here, may be given an opportunity to urge their views; that is, the two cases should be consolidated for argument on the question of the Board's statutory power to impose litigation and organizational expenses in order to remedy unfair labor practices. That would afford this Court the most thorough and careful airing of a most important question in the administration of the Act while it afforded an opportunity to be heard to those whose interests are now in jeopardy through litigation.

B. The Board Lacks Statutory Power Or Warrant To Impose Litigation And Organizational Costs As A Remedy In Unfair Labor Practice Cases.

Both the Board and the Courts are statutorily limited by the Act in the remedies which they may prescribe. The threshold question in the case, accordingly, is whether the Act allows the Board, in the first instance, to grant a reimbursement, to either the Board and/or a charging party, of litigation expenses or additional organizational costs. For it follows *a fortiori* that, if the Board is so limited, the Act likewise limits the courts from granting such relief. The question of the appropriate tribunal to grant such a remedy—the primary question presented by the Board and the Union—is academic when, as Heck's and the Chamber contend, neither tribunal has such power under the Act. This Court has repeatedly emphasized that the Act, and not the Board or the courts, is the ultimate limiting factor in determining what remedies can

be meted out by the Board in correcting unfair labor practices. As this Court cautioned in *Nathanson* v. *N.L.R.B.*, 344 U.S. 23, 29 (1952), in overruling a Court of Appeals' decision approving the Board's determination that the Act permitted back pay claims to be given priority in bankruptcy proceedings, "[W]hether that should be done is a legislative decision".[4]

2. Unlike the federal courts, the Board has no inherent equitable powers; the Board, like other administrative agencies, is "entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *C.A.B.* v. *Delta Air Lines*, 367 U. S. 316 (1961).

This Court has repeatedly emphasized that punitive relief, such as that imposed by the court below, is ". . . clearly not granted to the Board by the Federal Acts." *International Union, U.A.W.* v. *Russell*, 356 U. S. 634, 646 (1958); *Republic Steel Corporation* v. *N.L.R.B.*, 311 U. S. 7, 10-12 (1940). To the contrary, remedies imposed by the Board must be remedial in nature. See Morris, *The Developing Labor Law*, Bureau of National Affairs, Inc. (Washington, D. C. 1971), p. 844. Furthermore, the Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, 605 (1954). Accordingly, those persons seeking full compensatory relief must look elsewhere "since such items of recovery are beyond the scope of present board remedial orders." *U.A.W.* v. *Russell*, at 646.[5]

---

[4] See also *H. K. Porter* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Switchmens Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); and *Commissioner* v. *Brown*, 380 U.S. 563, 579 (1964).

[5] Thus, in *Operating Engineers Local 513*, 145 NLRB 554 (1963), the Board denied backpay to employees for lost work time caused

Attorneys's fees and organizational costs must be considered punitive and collateral and beyond the Board's powers. Such relief will not make employees whole for any losses they have suffered. Inasmuch as such relief will be discriminatorily handed out, it can only be regarded as punishment to the respondent in those cases where the Board or the courts are of the opinion that the respondent has engaged, as found here by the court below, in "clearly aggravated or pervasive misconduct" and "flagrant repetition of conduct previously found unlawful." *Food Store Employees Union Local No. 347* v. *N.L.R.B.*, 476 F. 2d 546, 551 (D. C. Cir. 1973). Since such relief will issue to deter future conduct, and not to make employees whole for any losses they have suffered, organizational costs and litigation expenses must, it is submitted, be considered punitive and beyond the Board's powers.

The conclusion that the statute permits the Board to impose, as a monetary remedy, only back pay to aggrieved employees derives support not only from the majority opinion in *Republic Steel, supra*, but as well from the dissent in which Mr. Justice Black and Mr. Justice Douglas concluded:

> It might fairly be implied by the words 'reinstatement of employees with or without backpay' that the employees must themselves be the recipients of the back pay. Were the opinion based on that ground we would acquiesce.

---

by the physical assault of union agents, and in *St. Clair* v. *Teamsters Local 515*, 442 F.2d 128 (6th Cir. 1969), collateral injuries, such as the loss of a home for inability to make mortgage payments, were deemed beyond the Board's remedial powers. An employer's business losses occasioned by unlawful strikes or picketing would also be denied in an unfair labor practice proceeding. In short, "collateral losses are not considered in framing a reimbursement order." *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7, 11-12 (1940),

3. The power to order the reimbursement of litigation expenses cannot be implied. It must be grounded on the express language of the law. *Fleishmann Corporation* v. *Maier Brewing Co.*, 386 U. S. 714, 720 (1967). The National Labor Relations Act, however, contains no such express provision, as exists under a variety of federal regulatory laws,[6] including those in the field of labor relations,[7] nor even a provision as in *Fleishmann* providing for the "costs of the action" which, notwithstanding the "deliberate" and "willful" violations there involved, was deemed insufficient to permit such an award. Indeed, an analysis of the legislative history of both the Wagner and Taft-Hartley Acts indicates that Congress squarely faced the question of damage awards and concluded that such a remedy was inappropriate to Board proceedings.

While the initial version of the National Labor Relations Act provided that violators "pay damages" to remedy their unfair labor practices,[8] these words were

---

[6] See, e.g., Clayton Act, § 4, 15 U.S.C. § 15; Communications Act of 1934, § 206, 47 U.S.C. § 206; Copyright Act, 17 U.S.C. § 116; Interstate Commerce Act, § 16, 49 U.S.C. § 16(2); Packers and Stockyards Act, § 309(f), 7 U.S.C. § 210(f); Perishable Agricultural Commodities Act, § 7(b), 7 U.S.C. § 499g(b); Securities Act of 1933, § 11(c), 15 U.S.C. § 77k(e); Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a); Servicemen's Readjustment Act 38 U.S.C. § 1822(b); and Trust Indenture Act, §§ 323(a), 53 Stat. 1176, 15 U.S.C. § 77www(a).

[7] See, *e.g.*, Civil Rights Act of 1964, as amended, §§ 706(k), 42 U.S.C. 2000e-5(k); Fair Labor Standards Act §§ 16(b), 29 U.S.C. §§ 216(b); Railway Labor Act, § 3(p) 45 U.S.C. § 153(p). Significantly, even the substantially stronger language of Section 303 of the Labor Act, which allows any person injured by an unlawful secondary boycott to "recover the damages by him sustained and *the cost of the suit*" (emphasis added), has been consistently construed as not *authorizing* the prevailing party to recover attorneys fees. See, *e.g.*, *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260, n. 16 (1964).

[8] Cong. Rec. 3445 (1934).

deleted by the Committee on Education and Labor.[9] A year later, in 1935, the Committee[10] also deleted words from a second version of the Act which would have empowered the Board to require "restitution."[11] The remedial provisions of the Act were thereupon amended to read as they now do, with the Board authorized "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."[12]

Equally significant in determining the legislative intent to prevent the Board from awarding damages is the discussion surrounding Section 303[13] which provides for a damage remedy in Federal District Court. Senator Taft who sponsored this section stated that damage relief was necessary since litigants could not bring an action for damages before the Board. In Taft's words:

> "[I]t is not felt, I think, by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that that particular function should be in the Board."[14]

It must be presumed, therefore, that had Congress intended to confer upon the Board or courts the extraordinary

---

[9] S. Rep. No. 1184, 73 Cong., 2d Sess (1934) at 3.

[10] Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Memorandum Comparing S. 1958 as a substitute for S. 2925, 34 (Comm. Print, 1935).

[11] S. 1958, 74th Cong., 1st Sess. (1935).

[12] S. Rep. No. 573, 74th Cong., 1st Sess., 15 (1935). See McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with the National Labor Policy?* 14 Wayne L. Rev. 1086 at 1092 n. 38 (1968).

[13] 29 U.S.C. Sec. 187.

[14] 93 Cong. Rec. 4854 (1947).

powers here involved, such powers would have expressly been granted as in the case of other agencies [15] or as in the case of federal appellate litigation.[16] "It may well be true," as this Court observed of a similarly broad reading of the Board's remedial powers in *H. K. Porter* v. *N.L.R.B.*, 399 U. S. 99 (1970), "that the present remedial powers are insufficiently broad to cope with important labor problems," but, "it is the job of Congress, not the Board or the Courts . . ." to correct such alleged deficiencies.

4. In *Hall* v. *Cole*, 412 U.S. 1 (1973) this Court held that litigation costs may be shifted to the unsuccessful litigant where a controlling statute so directs. However, as stated, an analysis of the Act demonstrates that the Board is not statutorily authorized to shift these costs. Although this Court also observed that even absent specific statutory mandate, a Federal Court exercising its equitable power, may award counsel fees when the interests of justice so require, this inherent equitable power does not extend to the Board or to other administrative agencies. Rather, as stated agencies such as the Board may exercise only powers expressly bestowed upon them by statute. See 1 Am. Jur. 2d. Administrative Law, Section 72; *H. K. Porter* v. *N.L.R.B.*, 397 U.S. 99 (1970).

In addition, under the rationale of *Hall* absent statutory authorization, litigation costs may be shifted only when the unsuccessful party has been guilty of contemptuous conduct; or where the litigation has bestowed a "substantial benefit on the members of an ascertainable class . . ."; or where the successful plaintiff is acting as a "private attorney general". These three considerations do not exist in this case. No class exists within the mean-

---

[15] See notes 3 and 4, *supra*.

[16] See, *e.g.*, 28 U.S.C. § 1912 permitting federal courts of appeals or this Court to assess single or double damages against the losing party.

ing of *Hall* or *Mills v. Electric Auto Lite Co.*;[17] there is no need to vindicate public rights by the litigation of a "private attorney general"; there has been no contemptible conduct. Consequently, there is neither statutory authorization nor any equitable basis to shift counsel costs in this case.[18]

Respectfully submitted,

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
The Chamber of
Commerce of the
United States of
America,
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684

Attorneys for the
Amicus Curiae

[17] 396 U.S. 375, 393-394.

[18] For the reasons expressed in the text, the general rule disfavoring attorneys fees should be applied. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. at 717, 718.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. a. In its original decision in *Tiidee I*[1], the Board found that the Company, in resisting the organizational drive of the International Union of

---

[1]Two Board decisions, hereafter *Tiidee I* and *Tiidee II*, were consolidated for purposes of review in the court of appeals.

Electrical, Radio and Machine Workers, AFL-CIO, at its Dayton, Ohio, plant, violated Section 8(a)(1) and (3) of the National Labor Relations Act by interrogating employees about their union activities, by raising production quotas, and by discharging and laying off certain employees because of their support for the Union. The Board also found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which had been certified by the Board as the representative of its employees following a Board-conducted election, and by refusing to supply the Union with requested information necessary for it to bargain intelligently (Pet. App. 34-35).[2] The Board ordered the Company, *inter alia,* to cease and desist from the unfair labor practices found, to reinstate the discharged employees, and to bargain with the Union (Pet. App. 38-44). The Board declined the Union's request for broader remedial relief (Pet. App. 37-38, 45-46).[3] The court of appeals enforced the Board's order, but remanded the case to the Board for further consideration of the Union's request for additional relief (Pet. App. 110-131).

---

[2]"Pet. App." refers to the appendix to the petition in No. 73-1180.

[3]The Union requested, *inter alia,* that the Company make the employees whole for wages and other benefits which they might have received but for the Company's unlawful refusal to bargain, and pay the Union the amount of dues and initiation fees it lost as a result of that refusal.

b. On the remand, the Board granted some of the additional relief requested by the Union, including the requirement that the Company reimburse the Board and the Union for litigation expenses, including attorneys' fees (Pet. App. 90-92). The Board noted that, in *Heck's, Inc.*, 191 NLRB 886, 889,[4] it had ruled that normally litigation expenses are not recoverable in a Board proceeding. It concluded that a departure from this rule was warranted in the case of "frivolous litigation such as this is", since the "policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available" (Pet. App. 90-91).

The Board denied the Union's request to make the employees whole for monetary losses suffered as a result of the Company's unlawful refusal to bargain (the "make-whole" remedy). Accepting as the "law of the case" the view of the court of appeals that the Board has authority to grant such remedy (Pet. App. 85), the Board concluded that it would not be "practicable" to do so in light of "the record herein." The Board found that the record provided "no way by which the Board could ascertain with even approximate accuracy * * * what the parties '*would* have agreed to' if they had bargained in good faith." (Pet. App. 87, emphasis in original.) The Board added that it would "further delay the commencement of meaningful collective bargaining" to remand the case to a Trial Examiner for a hearing to devise a " 'make-whole' formula for backpay to be awarded employees, if any." For, the Company, "which is under order to bargain with the Union, is not likely to

---

[4]This case is before the Court in *National Labor Relations Board v. Food Store Employees Union, Local* 347, No. 73-370.

agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain" (Pet. App. 87-88).

Thereafter, in *Tiidee II,* which involves further unfair labor practices committed by the Company after the events covered in *Tiidee I,* the Board followed the same course. It awarded litigation expenses, but declined the Union's request for a make-whole remedy (Pet. App. 101-102).

c. Petitions to review the Board's supplemental orders in *Tiidee I* and *II* were filed in the court of appeals by both the Company and the Union, and the Board filed a cross-petition for enforcement of those orders. The Company contested the orders on the ground, *inter alia,* that the Board lacks statutory authority to award litigation expenses even in frivolous cases. The Union challenged the Board's action in refusing to provide the make-whole and other remedies which it requested. The court of appeals heard argument in the cases on September 24, 1973, and they are awaiting its decision.

2. In No. 73-1180, the Company, in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals—*i.e.,* whether Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board to order a respondent to reimburse the Board and the charging party for expenses incurred in the investigation, preparation, and conduct of an unfair labor practice case (Pet. 3).[5] In No. 73-1423, the Union, like-

[5]The Company also seeks to present the further question whether, assuming the existence of such power, the Board was reasonable in awarding litigation expenses subsequent to the date when the Company offered to comply with its obligations under the Act (Pet. 3).

wise in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals— *i.e.*, whether the Board has power to make the employees whole for losses suffered as a result of an unlawful refusal to bargain with their union representative (Pet. 3).[6]

The issues presented by the petitions are not "* * * of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court" prior to judgment in the court of appeals. Rule 20 of the Rules of this Court.[7] The question the Company raises—whether the Board has power to award litigation expenses—was not raised by either the Board or the Union in this Court in *National Labor Relations Board* v. *Food Store Employees Union, Local 347,* No. 73-370, argued March 18-19, 1974, and therefore is not properly before the Court in that case. See the Board's supplemental brief in that case, pp. 1-5. Moreover, *Tiidee I* and *II* were argued in the court of appeals on September 24, 1973 and that court may be holding its decision pending this Court's decision in *Food Store*

---

[6]The Union also seeks to present these further questions: (1) whether, assuming that the Board has power to provide a make-whole remedy, it abused its discretion in failing to order it here; (2) whether it erred in failing to reimburse the Union for the initiation fees and dues which it could have collected upon the signing of an agreement by the Company; and (3) whether the Board erred in failing to reimburse the Union for excess organizational expenses (Pet. 3-4).

[7]The power of this Court to review determinations of administrative agencies before judgment in the court of appeals has never been definitively settled. See Stern and Gressman, *Supreme Court Practice,* pp. 28-30 (4th ed. 1969). Although we believe it has that power, for the reasons given in the text this would not be an appropriate occasion to exercise it.

Employees. Although the issue of Board power is not presented therein, this Court's opinion in *Food Store Employees* may nonetheless provide some guidance to the court of appeals on that issue, and that court should be afforded an opportunity to consider the *Tiidee* cases in light of this Court's opinion.

The Union, agreeing that the issue presented by the Company should be reviewed by this Court, has filed a petition asking this Court to review "the whole issue of power to remedy a frivolously based refusal to bargain" (Pet. 17), including the Board's power to grant a "make-whole" remedy. As indicated above, review of the issue presented by the Company is not warranted. Moreover, the general issue stated by the Union's petition is not presented in these cases. The court of appeals assumed that the Board had the power to grant the remedies requested by the Union, and left it to the Board to decide which were appropriate (Pet. App. 124-125); the sole question before that court is whether the Board's order on remand complies with the court's earlier decision. That is an issue on which it is particularly appropriate that the court of appeals speak first, and indeed one which, ordinarily, this Court would not review.

In short, neither the petition of the Company nor that of the Union warrants by-passing the normal appellate procedure of court of appeals review of agency determinations.

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1974.

MAY 6 197
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1180 and OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1423

LAWRENCE M. COHEN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ROY E. BROWNE
Hershey, Browne, Wilson, Steel,
Cook & Wolfe
1910 First National Tower
Akron, Ohio 44308
Attorneys for Tiidee Products, Inc.

Gunthorp-Warren Printing Company, Chicago • 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1180

and

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1423

Both Tiidee Products, Inc. ("Tiidee" or "the Company") and the International Union of Electrical, Radio and Machine Workers, AFL-CIO ("the Union") have filed petitions for writs of certiorari before judgment seeking to review the supplemental decisions and orders of the National Labor Relations Board in the instant cases. On April 25, 1974, subsequent to the filing of these petitions, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in this matter which is appended hereto. That decision dramatically underscores the importance of the questions presented for review by Tiidee and the integral relationship of such issues to those presently before this Court in *NLRB* v. *Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America* ("*Food Store Employees*"), No. 73-720.[1] The decision of the Court of Appeals also removes any need to review the separate matters raised by the Union in No. 73-1423.

1. The Company's petition in No. 73-1180 urged that review by this Court was appropriate to consider the basic question underlying *Food Store Employees, viz.*, whether either the Board or the courts have authority to order a respondent in a proceeding under the National Labor Relations Act, 29 U. S. C. Section 141, *et seq.* ("the Act"), to reimburse the Board and/or a charging party for attorney fees and other litigation costs. Both the Board and the Respondent in *Food Store Employees* have argued that case did not properly present this threshold question but, rather, only concerned the secondary problem of whether, *assuming* that such a cost remedy may be awarded under the Act, the Court of Appeals could permissibly direct the Board to grant such relief. See, e.g., the Board's supple-

1. The Clerk of the Court of Appeals has requested (App., p. A27) that the Board "file a proposed judgment consistent with the enclosed opinion pursuant to the provisions of Rule 19 of the Federal Rules of Appellate Procedure", and it is expected that such a judgment will be settled by the court shortly. At such time, if this Court has not acted upon the petition in No. 73-1180, Tiidee requests that the petition be considered as a petition for writ of certiorari.

mental brief in *Food Store Employees*, p. 3. ("This Court . . . has decided issues presented by the parties without reaching underlying issues that the parties did not raise"). In order to avoid piecemeal and perhaps even unnecessary adjudication (cf. e.g., *Moore* v. *Mead's Fine Bread*, 348 U. S. 115 (1954)), therefore, Tiidee suggested that the issues presented in No. 73-1180 should be considered in conjunction with those raised in *Food Store Employees* or, alternatively, that any decision in *Food Store Employees* should be postponed until after resolution of Tiidee's petition under the procedure followed in *Red Lion Broadcasting Co., Inc.* v. *F. C. C.*, 390 U. S. 916 (1968), and 393 U. S. 1014 (1969). See pet. for cert. in No. 73-1180, pp. 9-11 and n. 11. The need for this approach was reemphasized, it is submitted, by this Court's serious concern during the argument of *Food Store Employees* as to whether the underlying issue of the Board's *power* to award attorneys' fees was properly before it for consideration. See transcript of oral arg. in No. 73-370, pp. 7-12.

The decision of the Court of Appeals in the instant cases forcefully reinforces the merits of Tiidee's petition. That opinion makes it abundantly clear that *Food Store Employees* has precluded any challenge in the District of Columbia Circuit—the circuit in which a petition for review under section 10(f) of the Act may be filed from *any* final order of the Board —as to the Board's authority to award attorney fees and reimbursement of litigation costs; that, although the Board's order here required modification, the court below was "bound as to the law", whatever the wisdom of that law, by *Food Store Employees*. App., pp. A5-A6, A10, A11, A13 and A14, n. 22, and Judge MacKinnon's comments following fn. 13 at App., pp. A7-A10. Reconsideration in the District of Columbia Circuit now foreclosed, the instant issue is one that is likely to be repeatedly litigated until resolved by this Court. The present posture of *Food Store Employees* in this Court, however, precludes review of the merits of this "law". Even the Court of Appeals found "somewhat disturbing [the] circularity of this

approach—the Board reacted to the strong remand in *Tiiddee I* by imposing attorney fees, *Food Store* then relied on the Board's supplemental decision in *Tiidee I* after our remand, and now we, in *Tiidee III*, rely in large part on the precedent established by *Food Store* to sustain the imposition of attorney fees and other litigation expenses." App., p. A10, n. 16. Granting the petition in No. 73-1180 would remove this undesirable decisional impediment and permit this Court to resolve all aspects of the question.

2. As Judge MacKinnon's separate views in the decision below demonstrate, the Board's authority to award attorney fees under the Act is, at the very least, subject to grave question. Thus, as Judge MacKinnon observes, and as argued in the Company's petition (pp. 11-14), justification for such an award cannot be premised on either the language of the Act, the Board's asserted equitable powers or even the underlying policies of the statute.[2] Since such an award has never before been granted, prior to *Food Store Employees* and the instant case, in the 39-year history of the Act, and may well "greatly increase", rather than decrease, "the number and complexity of cases before the Board . . . and add greatly to the Board's burdens", Judge MacKinnon correctly insisted upon "a more clearly expressed statutory mandate" or, as Tiidee requests, approval by this

2. As Judge MacKinnon notes, the National Labor Relations Act does not contain the requisite "unambiguous and specific [authorization] language consciously selected by Congress in other statutes"; an "administrative agency possess no . . . inherent equitable powers"; the legislative history of the Act" strongly suggest that the Congress never intended the Board to possess the power to impose attorney fees and other litigation expenses"; and that it would "be unsound policy to invest the Board with the power to grant attorney fees." App., pp, A7-A10. Judge MacKinnon further observes that there is a substantial question whether, in fact, Tiidee engaged in any "frivolous" conduct in this case and "that the Company [may well have] had legitimate grounds" for its actions. App,, A10 through A12. And finally, Judge MacKinnon observes that, in his opinion, an award of attorney fees and other litigation expenses "arguably falls within the ambit of *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7 (1940)", which, precludes "the use of a pure deterrent rationale as a basis for upholding [Board] orders . . ." App., p. A14, n. 22 and p. A16.

Court, "to authorize the Board to order a remedy in which even the courts seldom indulge." See Judge MacKinnon's comments following fn. 13 at App., pp. A7-A10.

3. The Union's petition in No. 73-1423, which raises the separate question of whether the Board can issue a so-called "make-whole" remedy, has been obviated by the decision below. The Board had already decided that it did not possess such power. See *Ex-Cell-O Corp.*, 185 N. L. R. B. 107 (1970) and App. to Pet. in 73-1180, p. 85. And the court below, which is the only court of appeals that has ever suggested that the Board possesses such novel authority (see *Culinary Alliance and Bartenders Union, Local 793* v. *N. L. R. B.*, 488 F. 2d 664, 666 (9th Cir. 1974), has now agreed with the Board that, at least in this case, the limits of such a remedy could not even be approximated, that here "the parties might not have reached any agreement at all", that such relief was "not practical", and that it "would not effectuate the policies of the Act . . ." Since "the Board's refusal to grant a "make-whole" remedy was thus not "without substantial support in the evidence" the Court of Appeals correctly determined that it was "not disposed to overturn" that finding. App. pp. A19-A22. The issue presented by the Union has, accordingly, now been rendered academic and not worthy of review by this Court.

For the foregoing reasons, as well as those set forth by the Company in its petition, it is respectfully urged that the petition in No. 73-1180 be granted and the petition in No. 73-1423 be denied.

Respectfully submitted,

LAWRENCE M. COHEN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ROY E. BROWNE
Hershey, Browne, Wilson, Steel,
Cook & Wolfe
1910 First National Tower
Akron, Ohio 44308
Attorneys for Tiidee Products, Inc.

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 72-1080

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TIIDEE PRODUCTS, INC.,

Intervenor.

No. 72-1365

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TIIDEE PRODUCTS, INC.,

Intervenor.

A2

No. 72-1691

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

No. 72-1692

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF AMENDED ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Decided April 25, 1974

Ruth Weyand, with whom *Winn Newman* and *Melvin Warshaw* were on the brief, for petitioner in Nos. 72-1080 and 72-1365 and Intervenor in Nos. 72-1691 and Nos. 72-1692.

Lawrence M. Cohen, with whom *Roy E. Browne* was on the brief, for petitioner in Nos. 72-1691 and 72-1692 and Intervenor in Nos. 72-1080 and 72-1365. *Alan Raywid* also entered an appearance for Tiidee Products, Inc.

William H. DuRoss, III Attorney, National Labor Relations Board, with whom *Patrick Hardin*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Abigail Cooley Baskir*, Attorney, National Labor Relations Board, were on the brief for respondent.

Before TAMM, MACKINNON and ROBB, *Circuit Judges*,

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: In these consolidated cases we are called upon to review[1] supplemental decisions and amended orders of the National Labor Relations Board (the Board) entered pursuant to our remands in *Tiidee I*[2] and *Tiidee II*.[3] The facts of these cases are fully stated in the prior Board[4] and court decisions. The remands in *Tiidee I* and *II* were based upon the contention of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (the Union) that extraordinary affirmative relief was required to undo the effects of what the court termed Tiidee Products, Inc.'s (the Company) flagrant refusals to bargain, and its subsequently frivolous litiga-

1. The Union and the Company seek review of certain portions of the supplemental decisions and amended orders, while the Board has cross-applied for enforcement of its amended orders. Our jurisdiction rests upon sections 10(e) and 10(f) of the National Labor Relations Act, 29 U. S. C. § 160(e), (f) (1970).

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 138 U. S. App. D. C. 249, 426 F. 2d 1243, *cert. denied*, 400 U. S. 950 (1970).

3. International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 142 U. S. App. D. C. 270, 440 F. 2d 298 (1970).

4. *Tiidee I*: Tiidee Products, Inc., 174 NLRB 705 (1969); Tiidee Products, Inc. (Supp. Decision), 194 NLRB 1234 (1972). *Tiidee II*: Tiidee Products, Inc., 176 NLRB 969 (1969); Tiidee Products, Inc. (Supp. Decision), 196 NLRB 158 (1972).

tion.[5] The Board's orders here under review provide certain additional relief requested by the Union, but do not go as far as the Union would have them. As modified by this opinion, the Board's orders will be enforced.

I

In *Tiidee I* this court held that the Company violated section 8(a)(5) of the National Labor Relations Act (the Act), 29 U. S. C. § 158(a)(5) (1970), by what the majority opinion variously characterized as a "brazen refusal to bargain," a "manifestly unjustifiable refusal to bargain" and a "clear and flagrant violation of the law."[6] It then attempted to defend its action before the trial examiner and the Board[7] on the basis of what the *Tiidee I* court found to be a violation of the express terms of the Agreement for Consent Election and "patently frivolous"[8] objections to the election by which the Union had obtained certification as the exclusive bargaining representative of the unit employees.

The relief ordered in the original Board proceedings in light of the section 8(a)(5) and other unfair labor practices included a broad cease and desist order, and required the Company to post appropriate notices, bargain collectively with the Union upon request, furnish the Union with certain requested information on current wages and fringe benefits, and reinstate with back pay employees laid off and discharged because of their union activities. These conventional remedies were found by

5. These decisions are binding upon this panel and partially determine our disposition of this appeal.

6. *Tiidee I, supra* note 2, at 255, 256, 254, 426 F. 2d at 1249, 1250, 1248.

7. The Company conceded the section 8(a)(5) violations on review before the *Tiidee I* court. It also conceded some of the section 8(a)(2) violations but resisted the findings and remedies dealing with other alleged violations. *Tiidee I, supra* note 2, at 252, 426 F. 2d at 1246.

8. *Tiidee I, supra* note 2, at 254, 426 F. 2d at 1248.

the *Tiidee I* court to be an inadequate means of insuring meaningful bargaining and to reward[9] unjustly the Company for its illegal actions during the delay of litigation and enforcement of the Board's orders. The case was thus remanded to the Board for further consideration of the Union's make-whole claim and other additional or alternative forms of relief. *Tiidee II* involved further section 8(a)(5) violations, as well as other unfair labor practices, and again the case was remanded for further consideration of more appropriate remedies in light of the *Tiidee I* decision.

In the supplemental decisions and orders here under review, entered under the compulsion of our prior decisions, the Board finally ordered some additional affirmative remedies for the section 8(a)(5) violations in both *Tiidee I* and *II* but again declined to order any broad make-whole relief. The Board thus denied payment to employees for the difference between wages and benefits actually received and what the Union contended they would have received had the Company bargained in good faith to agreement on a contract with the Union. Similarly, the Board denied the Union's request that it be reimbursed for allegedly "lost" dues and fees, and organizational expenses. The Board did, however, order the Company to reimburse the Board and the Union for all litigation expenses, including attorney fees, in connection with the section 8(a)(5) issues in both Tiidee *I* and *II*.[10]

---

9. It is a reward only if one considers that increased benefits were certain to be obtained by the Union. Such a result, however, was uncertain and remains so to this day. Thus, it is not strictly accurate to say that the Company profited or was rewarded by the delay.

10. The Board stated it was unable to allocate litigation expenses between the section 8(a)(5) and other violations in *Tiidee II* and thus granted reimbursement for all such expenses. Tiidee Products, Inc., 196 NLRB at 159 n. 7 (1972); Jt. App. at 127 n. 7. We think this finding is untenable and therefore the Board shall be required to determine the proper allocation of litigation expenses related to the section 8(a)(5) violations. *See* text following note 30 *infra*.

Additionally, the Company was ordered to mail copies of the Board's posted notices to the home of each employee in the bargaining unit, permit Union access to the Company's bulletin boards and other places where notices to employees are posted so it could post Union notices and other literature during the ensuing period of contract negotiations, and furnish the Union with a list of names and addresses of its employees and to keep the list current for a period of one year. As to these latter affirmative actions required of the Company, we fully agree with the Board's finding that they are necessary and appropriate to guarantee that rights conferred by section 7 will not be denied.[11]

II

In the supplemental proceedings in both *Tiidee I* and *II*, the Board ordered the Company to "[p]ay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts . . . ."[12] Apparently the Board ordered this remedy in response to the *Tiidee I* court's suggestion that

> [t]he scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award to the Union . . . for the costs of having to litigate a frivolous case . . . .[13]

The Company vigorously contests the power of the NLRB to order the award of attorney fees and other litigation expenses to the Board and the Union, but that issue was recently settled in this circuit in *Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters* v. *NLRB*, 155 U. S. App. D. C. 101, 476 F. 2d 546, *cert. granted*, 94 S. Ct. 567 (1973), which held that the Board does have the power in appropriate cases

11. Tiidee Products, Inc., 194 NLRB 1234, 1235-36 (1972).
12. *Id.* at 1237; 196 NLRB 158, 159.
13. 138 U. S. App. D. C. at 259 n. 15, 426 F. 2d at 1253 n. 15.

to order such a remedy.* Thus *Food Store* in large measure controls our disposition of that issue in this case.

* My views on the issues in *Tiidee I* and *II* are set forth in my dissenting opinions to those decisions. In this third stage of the *Tiidee* proceedings, the opportunity to consider as a matter of first impression the adequacy and legal soundness of the Board's supplemental decisions and amended orders has been circumscribed by the intervening *Food Store* decision, decided by another panel of this court. In these circumstances, and because of my prior participation in *Tiidee I* and *II*, it is peculiarly appropriate to set forth my individual views on three basic issues. These personal views are set forth in this footnote*, and in footnotes** and ***, *infra*. As to footnote **, we all recognize that we are bound by the law of the case but my prior familiarity with the record in *Tiidee I* and *II* compels me to reaffirm my individual dissent in those cases with additional detail. As to footnotes * and ***, Judges Tamm and Robb feel that debate in this circuit has been foreclosed by Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters v. NLRB, 155 U. S. App. D. C. 101, 476 F. 2d 546, *cert. granted*, 94 S. Ct. 567 (1973). As my authorship of the opinion for the court demonstrates, I agree that *Food Store* is controlling; nonetheless, I feel it necessary to express my personal opinion on what I perceive as relatively clearcut and as yet not illuminated issues.

It is my individual opinion that section 10(c) does not authorize the Board to award attorney fees. Traditional American jurisprudence circumscribes even the power of the courts to award attorney fees. There are, of course, several well established exceptions to the American rule prohibiting their award by the courts. Hall v. Cole, 412 U. S. 1 (1973). The award of attorney fees by a statutory board in this case is predicated upon a congressional grant of authority pursuant to secton 10(c) of the Act. The broad language of that section, however, does not compare favorably with the explicit, unambiguous and specific language consciously selected by Congress in other statutes. For example, the Interstate Commerce Act provides that "[i]f the plaintiff shall finally prevail [in court] he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit." 49 U. S. C. § 16(2) (1970). Similarly, the Clayton Act specifically requires that a person injured by a violation of the antitrust laws "shall recover [in court] the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15 (1970). Thus the unvarying rule is that when Congress intends to permit the courts to award attorney fees to the prevailing party in statutory causes of action, it does so with precision and unmistakable clarity. *E.g.*, Packers and Stockyards Act, 1921 § 309(f), 7 U. S. C. § 210(f) (1970); Perishable Agricultural Commodities Act § 7(b), 7 U. S. C. [§*] 499g(b) (1970); Trust Indenture Act of 1939 § 323(a), 15 U. S. C. § 77www(a) (1970);

(Continued on Next Page)

[* See erratum, *infra*, p. A26.]

Food Store involved " 'clearly aggravated and pervasive' misconduct [by the employer, and the Board] questioned [the em-

---

Securities Act of 1933 § 11(e), 15 U. S. C. § 77k(e) (1970); Securities Exchange Act of 1934 §§ 9(e), 18(a), 15 U. S. C. §§ 78i(e), 78r(a) (1970); Copyright Act § 116, 17 U. S. C. § 116 (1970); Labor-Management Relations Act (Taft-Hartley Act) § 303, 29 U. S. C. § 187(b) (1970) (relating to secondary boycotts) (*see also* Local 20, Teamsters, Chauffers & Helpers Union v. Morton, 377 U. S. 252, 260 n. 16 (1964)); Fair Labor Standards Act of 1938 § 16(b), 29 U. S. C. § 216(b) (1970); Servicemen's Readjustment Act § 1822(b), 38 U. S. C. § 1822(b) (1970); Civil Rights Act of 1964 § 706(k), 42 U. S. C. § 2000e-5(k) (1970); Railway Labor Act § 3(p), 45 U. S. C. § 153(p) (1970); Communications Act of 1934 § 206, 47 U. S. C. § 206 (1970).

Absent statutory authority, courts may, in the exercise of their inherent equitable powers, award attorney fees in certain carefully circumscribed situations where "overriding considerations indicate the need for such a recovery." Hall v. Cole, *supra,* at 4-5. An administrative agency possesses no such inherent equitable power, however, for it is a creature of the statute that brought it into existence; it has no powers except those specifically conferred upon it by statute. The Board's power to award attorney fees, then, depends exclusively upon section 10(c). That section admittedly constitutes a broad grant of authority, Phelps-Dodge Corp. v. NLRB, 313 U. S. 177 (1941), but in that very broadness, as contrasted to the statutes cited above, lies the fatal flaw to any argument that the Board has the power to order reimbursement for attorney fees and other litigation expenses. Section 10(c) grants the Board the authority to order an employer or union to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" the Act. The words "affirmative *action*" are calculated more to connote that type of action ordinarily ordered by the Board in unfair labor practice cases, such as ordering the parties to engage in collective bargaining, to cease and desist from unfair labor practices, refrain from secondary boycotts, cease unlawful picketing, and so forth. Moreover, where monetary compensation is involved, the Congress thought it necessary to state explicitly that employees could be "reinstated with or without *back pay.*"

There is yet another significant weakness in the argument that section 10(c) authorizes the Board to award attorney fees. The Labor Act, especially after the 1947 amendments, was intended carefully to adjust and balance the rights and interests of labor, management and the government; the Act manifestly was designed to provide fair and even-handed treatment. The award of attorney fees pursuant to section 10(c) demonstrably does violence to these

(Continued on Next Page)

ployer's] good faith because of its 'flagrant repetition of conduct

fundamental precepts, however, for no comparable remedy is available against a *charging* party even though in filing a charge and causing a complaint to issue he may be motivated by the same illegal reasons (a pattern of illegal resistance to unionization) and be engaged in the same conduct (frivolous litigation) on which such award is premised in *Food Store* and the instant case. The "affirmative action" clause in section 10(c) applies only against the *charged* party. By contrast, a charging party, who is a party of right (29 C. F. R. § 102.8 (1973)) permitted fully to litigate the case at the hearing (29 C. F. R. § 102.38 (1973)) and before the Board, may file a charge based on totally false facts or raise totally frivolous issues for the purpose of infringing an employer's protected rights and yet, if the Board determines that the complaint based on such a charge is totally without merit, section 10(c)'s second proviso provides *only* that "the Board shall state its findings of fact and shall issue an order dismissing the said complaint." And, although it may be hoped that the regional directors or the General Counsel would weed out such charges and not issue a complaint, it is clear that such frivolous cases may occur, especially since neither the Act (section 10(b)) nor the regulations (29 C. F. R. § 101.4 (1973)) requires any investigation of the charges prior to the issuance of a complaint. Thus, although perfect symmetry is not required or even expected, the fact that a charging party who engages in frivolous litigation escapes completely unscathed while his counterpart, for example the Company in this case, is liable for large litigation expenses strongly suggests that the Congress never intended the Board to possess the power to impose attorney fees and other litigation expenses.

It is also of critical importance in construing so broad a grant of authority, one thought by Congress best to reside in "the empiric process of administration," *Phelps-Dodge, supra,* at 194, that in the entire 39-year history of the Act section 10(c) has never before been interpreted to support the exaction of attorney fees in cases such as this. This consistent administrative interpretation and practice for so many years argues persuasively against change by the Judiciary. After more than a decade of operation without such a remedy, section 10(c)'s precise language survived intact the 1947 Taft-Hartley Amendments. Moreover, in all the 39 years of legislative history surrounding section 10(c), none of it gives any support for the interpretation that Congress intended to allow the Board to award attorney fees and litigation expenses to prevailing parties. Therefore, if the complaint be made that the powers of the Board are inadequate, let it be made to the Congress and not the Judiciary—any proper conception of, and respect for, the relative domains of each demands no less.

It would, moreover, be unsound policy to invest the Board with the power to grant attorney fees, for theory rarely is con-

(Continued on Next Page)

previously found unlawful' at other [of its] stores."[14] The premise for sustaining the award of litigation expenses in *Food Store* was that

> employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board.[15]

As stated above, we do not write today on a clean slate but are bound as to the law by *Food Store*. That being so, we are led inexorably to the conclusion that if the facts of *Food Store* presented an appropriate case for the award of attorney fees, then, *a fortiori*, the instant case does also.[16] The element of frivolus litigation, as the *Tiidee I* court decided exists in this case, presents a different and even stronger situation for awarding litigation expenses if the payment of attorney fees can be ordered paid for flagrant repetition of conduct violative of the National

---

gruent with reality. It may well be a reassuring proposition to state that attorney fees will only be awarded in frivolous or flagrant cases, but the predicates of the adversary system augurs intense litigation over the very premise of such an award, that is, whether a case is frivolous or flagrant. Such synergistic circumstances would greatly increase the number and complexity of cases before the Board, and what began as a means of ridding the Board and the courts of frivolous cases (which are relatively few in number) would finally produce quite the opposite result and add greatly to the Board's burdens.

I would require a more clearly expressed statutory mandate to authorize the Board to order a remedy in which even the courts seldom indulge.

14. 155 U. S. App. D. C. at 106, 476 F. 2d at 551.

15. *Id.*

16. We are, of course, cognizant of the somewhat disturbing circularity of this approach—the Board reacted to the strong remand in *Tiidee I* by imposing attorney fees, *Food Store* then relied on the Board's supplemental decision in *Tiidee I* after our remand, and now we, in *Tiidee III*, rely in large part on the precedent established by *Food Store* to sustain the imposition of attorney fees and other litigation expenses.

Labor Relations Act. The court's finding in *Tiidee I* that, on the facts presented, the Company had engaged in frivolous litigation constitutes the law of this case.** The court's articulation of that

** Although it is the law of this case, it is my individual opinion (*see* note*, *supra*) that the Company's conduct of this litigation is not as frivolous as the adjectival characterizations of the *Tiidee I* majority would suggest. The Company had a legitimate complaint against the Union's circulation of a misrepresentative handbill to the employees on the very day of the election, just eight hours prior to the balloting. The handbill misrepresented the issues in the election by holding out the alluring promise that "greater benefits" were "exactly" what a "Yes vote" would produce. Report on Election, Exhibit A, J. A. at 220. Board decisions, however, generally allow unions some latitude in this area, to the extent that they may promise benefits they may be unable to procure. *See, e.g.*, Burson Plant of the Kendall Co., 115 NLRB 1401 (1956); Olson Rug Co., 118 NLRB 1274 (1957). The interjection of such misrepresentative matter at the last minute so that the employer cannot respond, however, must be viewed in a different light. In this context, the Company justifiably could feel unfairly treated on the significant question of whether it would be unionized. But for the late hour at which the handbill was distributed, the Company could and probably would have responded with a handbill of its own to inform the employees of the precise implications of a "Yes vote" in the election.

The obvious strategical move, calling a meeting of the employees to answer the Union's misleading literature in a speech, was prohibited by the *Peerless Plywood* rule. Peerless Plywood Co., 107 NLRB 427 (1953). Under *Peerless*, while "unions or employers [may] circulate campaign literature on or off the premises at any time prior to an election," *id.* at 430, they are "prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Id.* at 429. Thus the Company was effectively precluded from answering what it considered to be unfair and misleading campaign propaganda and tactics, the obvious purpose and intent of which was to influence the election against the Company.

When the election resulted in a union victory, the Company naturally and justifiably inferred that the misleading campaign propaganda had influenced the result to some degree. The Company undoubtedly thought that in logic and reality such last minute handbilling is indistinguishable from last minute speeches, which the Board has recognized "tends to create a mass psychology [and is] the last most telling word." *Id.* Mousetrapped between the 24 hour no-speech rule and the rule permitting unions to propagandize up to the time of balloting, the Company felt it imperative to make legal objections to the election. The Regional Director investigated,

(Continued on Next Page)

finding [is a harsh litany: the Company's conduct was a clear*]

but did not hold any hearing on the Company's objections and ruled against the Company. He found that the Union's handbill's did not influence the election result, *a conclusion contrary to the obvious effect intended by the Union.* It may be cogently argued that a hearing was necessary in order to determine the psychological and practical effect of the Union's handbilling immediately prior to the election. Employees could have been called to determine whether they thought that as a result of a union victory they would be guaranteed greater benefits as the literature promised. The Trial Examiner almost casually termed as "frivolous" the Company's failure to acquiesce to the Regional Director's decision, even though *the Company's refusal to bargain was the only method under the Act by which it could seek review of that decision.* The trial examiner would have to have been prescient to realize he was opening a Pandora's box of complex and protracted litigation by this casual reference, when subsequently the *Tiidee I* majority greatly expanded his factual finding to make the Company's position "palpably" and "patently" frivolous. *See* text following this note. Viewed in total context, one could [*] not fairly characterize as frivolous the actions taken by the Company; the Company's conduct, moreover, could hardly be termed any more frivolous than the Union's demand for a remedy never previously ordered in the entire 39-year history of the Act and still thought by the Board not to be within its power under section 10(c) to grant.

The analysis of Chairman Miller of the NLRB in his dissent in *Tiidee II* supports his conclusion that the Company's defenses in that case had not been "asserted frivolously." His dissenting opinion stated:

> As the majority opinion points out, our decision in *Tiidee I* to award costs and attorneys' fees was based on the court's finding that the litigation there had been frivolously engaged in by Respondent.
>
> In reviewing the record in the instant case, I am unable to find that the defense here was asserted frivolously. *The majority opinion here seems to me to evade this issue and to rely on the extent of Respondent's unfair labor practices (which, however reprehensible, are no more extensive than those committed by both unions and employers in a considerable percentage of the 800 or so cases we review each year) and on the degree of Respondent's union animus and hostility.* But the degree of Respondent's hostility has little or nothing to do with the frivolity of its defenses to the allegations of the complaint in this proceeding.
>
> For these reasons I dissent from that portion of this Decision which awards costs and attorneys' fees.

(Continued on Next Page)

[* See erratum, *infra*, p. A26.]

and flagrant violation of the law"[17]; "its objections to the election were patently frivolous"[18]; the Company's action was "a brazen refusal to bargain, in violation of solemn obligations"[19]; its position was "palpably without merit"[20]; and the case involved "a manifestly unjustifiable refusal to bargain."[21] In light of the precedent established by *Food Store* and of the court's decision in *Tiidee I* as to the law and the facts, stare decisis and the law of the case leave us no recourse but to enforce at least in part the Board's award to the Union of attorney fees and litigation expenses.

III

Difficulties remain, however, as to the manner in which the *Food Store* and *Tiidee* decisions may be accommodated with our view of the Board's orders in this case. Two significant issues, therefore, must be confronted. First, whether the Board itself should be reimbursed for its expenditures in litigating this case, and second, whether legal expenses during the full course of this litigation should be allowed. We answer both in the negative.

A. *Reimbursement to the Board*

Any remedy ordered by the Board under section 10(c) must satisfy the ultimate standard that it is designed both in intent and operation to effectuate the policies of the National Labor

196 NLRB at 157 (emphasis added). The italicized statement is equally applicable to the court's majority opinion in *Tiidee I*.

Although I recognize that the Company faced a very difficult position so far as the Board and its decisions were concerned, I also believe that the Company had legitimate grounds for considering as a matter of simple justice that it did have a valid complaint, as the trial examiner did, by the statement that the handbill did not influence the election, is completely speculative and denies that the handbill had the very effect that its authors and distributors intended it to have.

17. *Tiidee I, supra* note 2, at 254, 426 F. 2d at 1248.
18. *Id.*
19. *Id.* at 255, 426 F. 2d at 1249.
20. *Id.* at 256, 426 F. 2d at 1250.
21. *Id.*

Relations Act. Three rationalizations may be advanced to support the proposition that the imposition of attorney fees and other legal expenses in cases of frivolous litigation effectuates the policies of the Act: (1) the policies underlying the traditional American rule against awarding attorney fees are unpersuasive in such cases[22]; (2) the remedy would effectively prevent the diversion of administrative resources from mer-

22. The American rule generally disfavors the award of attorney fees and other litigation expenses except where specifically provided for by statute or contract. Hall v. Cole, 412 U. S. 1, 4 (1973). *See. e.g.,* Clayton Act § 4, 15 U. S. C. § 15 (1970); Interstate Commerce Act § 16, 49 U. S. C. § 16(2) (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U. S. 714, 717 (1967); Hauenstein v. Lynham, 100 U. S. 483 (1880). *Food Store,* [*] *supra,* has established for this circuit that the power to award attorney fees does repose in section 10(c), *i.e.,* that the statute here is within the recognized exception to the general rule. As a matter of guiding principle we note, however, that the rationales underlying the traditional rule, *see* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U. S. 714, 718 (1967); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages,* 15 Minn. L. Rev. 619, 639-40 (1931), are soundly applicable only in cases involving meritorious or colorable legal claims and defenses. *See* Amalgamated Local Union 355 v. NLRB, 481 F. 2d 996 (2d Cir 1973).

23. The *Tiidee I* court was concerned that such frivolous litigation as that engaged in by the Company would "drain and divert judicial resources from the provision of justice to the crowded calendars and to meritorious litigants whose claims clamor for attention. The same considerations are presumably applicable at the administrative level." *Supra* note 2, at 256, 426 F. 2d at 1250. In this respect, it would be disingenuous to fail to recognize explicitly that the litigation expenses remedy has a deterrent aspect and thus arguably falls within the ambit of Republic Steel Corp. v. NLRB, 311 U. S. 7 (1940). The instant case, however, presents somewhat different factual circumstances and the award of legal expenses, at least to the Union, may more cogently be described as remedial. *See* note 24 *infra.* This assertion assumes the proportions of semantic jousting, but the cavil may be raised as to any "remedial" order that it also has an impermissible deterrent effect. If *Food Store, supra,* is to be relied upon, however, this does not preclude its use where its primary thrust is truly remedial.

(Continued on Next Page)

[* See erratum, *infra,* p. A26.]

itorious cases[23]; and (3) the award of such costs might help restore the Union to the status quo ante.[24]

In *Food Store,* the court enlarged the Board's order to include the award of litigation expenses to the Board as well as the union. The court found it unnecessary on the facts and legal theory there involved to consider explicitly whether an award of legal expenses to the Board involved considerations distinct from granting such reimbursement to a union. The significantly distinguishing feature of *Food Store* was the employer's comprehensive pattern of illegal resistance to any form of unionism. The court succinctly summarized the employer's predilection for unlawful conduct:

> The employing company . . . is not a stranger to the processes of the Board. Operating a chain of discount stores in the Southeast, this is the eleventh time that its resistance of union organization has embroiled it in Board proceedings. In none has it prevailed at the Board level, and its fortunes in the Courts of Appeals have been only marginally better.[25]

The *Food Store* court thus held that an employer who egregiously continues to violate the Act must reimburse both the Board and the union for their legal expenses.

By contrast, in the instant case we are confronted with an

---

24. Frivolous litigation on a protracted basis might be so burdensome financially as to interfere seriously with the ability of the affected party to function and act effectively. In such circumstances, the claim is made that this remedy in part may also be designed to restore the injured party to the status quo ante, a well recognized goal of the Board's remedial powers. Phelps-Dodge Corp. v. NLRB, 313 U. S. 177, 194 (1941); Decaturville Sportswear Co. v. NLRB, 406 F. 2d 886, 889 (6th Cir. 1969); Local 57, International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 126 U. S. App. D. C. 81, 86, 374 F. 2d 295, 300, *cert. denied,* 387 U. S. 942 (1967); *see* Local 60, United Brotherhood of Carpenters & Joiners of America v. NLRB, 365 U. S. 651 (1961). The award of attorney fees based on this principle, however, greatly exceeds the manner in which it normally has been applied by the Board and the courts.

25. 155 U. S. App. D. C. at 102, 476 F. 2d at 547. *See also* text accompanying notes 14-15 *supra.*

employer who actually is a "stranger to the processes of the Board," however wilful his violation and frivolous his defenses. Confronting this situation, the *Tiidee I* court demonstrably was concerned principally with assuring adequate remedial relief to the Union rather than to the Board. The entire thrust of the *Tiidee I* decision, as evidenced by the discussion on make-whole relief, focused on remedying the harm suffered by the Union because of the Company's conduct. Indeed, in suggesting the alternative relief of reimbursement of litigation expenses, the *Tiidee I* court specifically contemplated that only the Union would receive such an award.[26] Moreover, although reimbursement to the Board arguably might be consistent with the incidental rationale in *Tiidee I* of preventing the diversion of administrative resources from meritorious cases, any such advancement of that policy would only be cumulative to that produced by reimbursement to the Union. Thus, while *Food Store* established the power of the Board to award legal expenses to itself,*** the present case does not present an ap-

26. *See* text accompanying note 13 *supra*. Thus the law of the case also dictates that an award of legal expenses to the Board exceeds "[t]he scope of the Board's consideration on remand." *Id.* United States Court of Appeals in an action in which the Board has successfully petitioned such court to hold in civil contempt a party who has violated that court's final order granting enforcement to a Board order. Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745 v. NLRB, ... U. S. App. D. C. ....., ... F. 2d ..... (No. 20,565, *et al.*, April 17, 1974); West Texas Utilities Co. v. NLRB, 92 U. S. App. D. C. 224, 206 F. 2d 442, *cert. denied*, 346 U. S. 855 (1953).

*** It is my individual opinion, again in which my brothers do not join, that an award of attorney fees and other litigation expenses to the Board itself falls within the prohibition of Republic Steel Corp. v. NLRB, 311 U. S. 7 (1940), which precludes the use of a pure deterrence rationale as a basis for upholding orders under section 10(c). In *Republic Steel* the Board ordered an employer to deduct from payments to employees reinstated with back pay amounts they had earned on public work relief projects and to pay such deducted amounts to the appropriate government agencies. The Court characterized such payments as "exactions" and stated that

> it [*] is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from

(Continued on Next Page)

[* See erratum, *infra*, p. A26.]

propriate situation for its exercise. Accordingly, the orders here under review shall be modified by deletion of any requirement of payment by the Company to the Board for attorney fees and other legal expenses.

B. *Limitation on Reimbursement to the Union*

The Company also contends that litigation expenses should not be allowed beyond the date of the Board's initial *Tiidee I* decision because as of that date it assertedly was ready and willing to bargain in good faith and the litigation subsequent to that date was related only to the determination of remedies appropriate to already conceded section [*] 8(a)(5) violations.[27] We find this argument persuasive. We sustain in principle the award of litigation expenses in this case because the *Tiidee I* court found that the Company raised frivolous defenses before the Board. All litigation subsequent to that date, however, certainly did not involve frivolous litigation by the Company—indeed, the opposite is true. After the Board's decision in *Tiidee I*, the Company only sought to sustain the *Board's position* that traditional relief was adequate, and to resist an attempt by the Union to have the Board impose the exceptionally novel remedy of make-whole relief, a remedy that has never been ordered in the 39-year history of the Act.[28] The Board

violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

Id. at 12. Since the NLRB was created and exists for the purpose of determining unfair labor practice cases and otherwise discharging its duties under the Act, reimbursement to the Board of legal expenses incurred in the discharge of its statutory duties under section 10(c) could only be justified on the impermissible rationale of deterrence. By contrast, this court has held that the Board may be reimbursed for attorney fees and other litigation expenses by a

27. Company Br. at 9, 17-18.

28. The union demand, made originally before the trial examiner, was that the

Respondent [Company] make the employees whole for wages

(Continued on Next Page)

[* See erratum, *infra*, p. A26.]

agreed with the Company at the outset of this litigation, before this court in *Tiidee I* indicated that such relief might be possible. Moreover, the Board continues to hold firmly the belief that it is without the power under section 10(c) to award the make-whole relief demanded by the Union.[29]

It is arguable, of course, that the section 8(a)(5) violations and the ensuing frivolous litigation before the Board cannot realistically be separated from attempts by the Union legally to cure the harm that they caused. Moreover, the limitation we delineate today might permit an employer to decimate a union, or vice versa, and escape imposition of remedial orders that comprehend the totality of his actions simply by vowing a change of heart. Thus we do not rely on the Company's assertion that after the Board's *Tiidee I* decision it was ready and willing to bargain. Nevertheless, we recognize that these protracted proceedings clearly constitute what is, in effect, a test case by the Union to establish the viability of a new concept of make-whole relief that amounts to an unprecedented remedy. We therefore think the Company should not, because of its misconduct at the start of the case, be forced fully to subsidize the Union's legal efforts in such a case.

---

and benefits which they might have received but for the Respondent's unlawful refusal to bargain, and that the Respondent be required to pay the Union the amount of dues and initiation fees it lost dating from 130 days after the Union was certified.

Jt. App. at 48.

29. The Board stated in its supplemental decision in *Tiidee I*:

> In *Ex-Cell-O* the Board majority enunciated its conclusion that Congress did not give the Board statutory authority to grant the compensatory monetary remedy requested by the Union. The court of appeals disagreed with this view of the scope of the Board's statutory remedial power and it remanded these cases to the Board for further proceedings not inconsistent with the court's opinion. Although *the Board adhers to the views expressed in Ex-Cell-O*, inasmuch as it has accepted the remand, it considers itself bound by the court's opinion as the "law of the case."

194 NLRB at 1234 (emphasis added).

In the *Tiidee II* supplemental decision the Board examined the Company's conduct "in the total context of [its] entire course of unfair labor practices" and found that, in view of its finding "in *Tiidee I* that frivolous issues were raised and litigated to postpone or avoid a lawful obligation to bargain, [the Company's] conduct in the instant case is so inextricably intertwined with [its] refusal on frivolous grounds to bargain with the Union as to require the conclusion that it was part of the same pattern of patently frivolous litigation for the same unlawful object. . . ."[30] Although we believe that the Company's legal position in *Tiidee II* cannot fairly be characterized as frivolous, there is ample support in the record for the finding that its conduct in *Tiidee II* was also designed to "postpone or avoid a lawful obligation to bargain" so that an award of litigation expenses properly is sustainable under *Food Store, supra.* As noted above, however, the award must be limited to expenses incurred in litigating the initial case before the Board and therefore does not extend to any subsequent legal proceedings involving the question of appropriate remedies.

In summary, the orders relating to the award of attorney fees and other litigation expenses are modified to delete any requirement that the Company reimburse the Board for its legal expenses, and to limit reimbursement to the Union to expenses it incurred only for litigation before the Board in the initial *Tiidee I* and *II* decisions.

IV

The Board refused to grant the broad make-whole remedy requested by the Union and the Union now strenuously argues that in so doing the Board failed to comply with this court's directives on remand. The Union's argument rests principally upon two grounds. First, that our decision in *Tiidee I* mandated a make-whole remedy, and second, that the Board improperly relied upon the difficulty of ascertaining the contract terms that

30. Tiidee Products, Inc., 196 NLRB 158 (1972); Jt. App. at 126.

would have been agreed to had the Company bargained in good faith. The first argument has little merit. The *Tiidee I* court quite clearly did not require imposition of a broad make-whole remedy; indeed, it indicated that the Board could select remedies other than make-whole relief if they would adequately effectuate the policies of the Act and were supported by reasoned analysis.[31]

The second contention of the Union has more substance but on full consideration it too must fail. The court in *Tiidee I* drew a distinction between contract terms that "would" and "should" have been agreed to by the parties had they bargained together in good faith to agreement. Although the Board does not have the power to impose "should" contract terms or to grant make-whole relief where no agreement would have been reached, the *Tiidee I* court clearly stated that:

> A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in quantifying appropriate compensation as a justification for withdrawal and frustration of the policy, particularly where such an approach would operate only to reward the wrongdoer and to give him an advantage over a law-abiding competitor.[32]

It is necessary, therefore, to examine and determine the sufficiency of the record evidence that would form the basis for awarding make-whole relief.

At the unfair labor practice hearing in *Tiidee I*, the trial examiner freely allowed the Union to introduce evidence in support of its make-whole request. And, in its Statement of Position of Charging Party on Remand,[33] the Union proffered certain evidence to establish the compensation and fringe benefits earned by employees prior to certification and what they could be expected to have received had the Company bargained in

31. *Tiidee I, supra* note 2, at 259, 426 F. 2d at 1253.
32. *Id.* at 257, 426 F. 2d at 1251.
33. Jt. App. at 135, 144-69.

good faith. This evidence is of limited relevance, however, because it, for example, refers to bargaining units of much greater size than the Union's, lumps all manufacturing industries together, and generally consists of national, rather than local, statistics.[34]

The precise issue, then, is whether this evidence validly could be translated into specific contract terms that would have been agreed to by both the Union and the Company had they bargained together in good faith to an agreement. The Board specifically found that it could not "ascertain with even approximate accuracy . . . what the parties '*would* have agreed to.' "[35] Moreover, the Board also seemed to suggest that the parties might not have reached any agreement at all.[36] We have closely examined the record evidence and cannot conclude that the Board's finding on this issue was without substantial support in the evidence.

There is yet another basis for affirming this aspect of the Board's decision, however, for it appears that the Board permissibly balanced the difficulty in this particular case of ascertaining the contract terms that would have been agreed to against the relative ease and certainty of awarding litigation expenses to the Union and ordering other affirmative remedies. The Board found that make-whole relief was "not practicable"[37] in this case, and that it "would effectuate the policies of the Act to grant some but not all of the requested relief."[38] Thus the Board found that its selection of affirmative remedies was an adequate alternative means of effectuating the Act's policies and satisfying the directives of the *Tiidee I* and *II* remands.[39]

---

34. *Id.*

35. Tiidee Products, Inc., 194 NLRB 1234, 1235 (1972).

36. *Id.*

37. *Id.*

38. *Id.* at 1234.

39. The Board declined to remand the case to a trial examiner to attempt to gather further evidence on the make-whole remedy.

(Continued on Next Page)

The *Tiidee I* court was "particularly" concerned that reliance on "the difficulty in quantifying appropriate compensation . . . would operate only to reward the wrongdoers"; this concern is largely vitiated by the additional remedies ordered in this case, including limited litigation expenses.[40] On these facts, given our limited scope of review, we are not disposed to overturn this finding.

V

The Union also requested compensation from the Company for Union member's dues and fees allegedly lost to it because of the Company's flagrant refusal to bargain. The Board premised its denial of this relief on two grounds. First, it argues that such relief is part and parcel of the broad make-whole remedy denied in this case since such items would come from "lost" wages.[41] Second, it felt that since it was the Union's policy to waive such dues and fees until after a contract had been signed, the risk of losing monies when no contract is signed should not be shifted from the Union to the Company.[42] *Food Store, supra,* considered this same issue and sustained the Board's denial of such relief in that case. *Food Store* premised its holding, *inter alia,* on the fact that "[i]t is undoubtedly true that union security clauses have attained a wide degree of use, but it also remains true that an employer may bargain to im-

---

It found that such action would be "counter-productive" and that it would not effectuate the policies of the Act to do so. *Id.* at 1235. The Company was under order to bargain with the Union and thus would not be likely to agree to any contract that might serve as a basis for establishing make-whole relief. Also, the Union had already had full opportunity to present such evidence. *See* text accompanying note 33 *supra.*

40. Our limitation on the legal expenses recoverable by the Union does detract somewhat from the implicit balancing process in which the Board appears to have engaged, but we think that the clear dictates of the law, combined with the additional affirmative actions required of the Company, satisfactorily resolve the complex of problems presented in this case.

41. Tiidee Products, Inc., 194 NLRB 1234, 1236 (1972).

42. *Id.*

passe with respect to such a demand, and that the Board may not impose that obligation upon the employer. *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970)."[43] We reaffirm that holding.

The Board also denied the Union's request for reimbursement of organizational expenses supposedly lost because of the Company's refusal to bargain. The Union argues that this remedy should be ordered because the money it spent in preelection organization efforts was "rendered a complete waste" due to the unlawful refusal to bargain.[44] It points out that the delay in bargaining caused loss of interest in the Union and loss of membership.[45] We agree with the Board, however,

> that the Union incurred no extraordinary organizational expenses . . . Despite certain already remedied preelection unlawful [Company] conduct, the Union was selected by the employees after a 2-month campaign at the first election held. We find, therefore, no nexus between [the Company's] unlawful conduct here under examination and the Union's preelection organizational expenses. . . .[46]

Thus the Union incurred only normal organizational expenses in its campaign for election. In *Food Store*, by contrast, organizational expenses were allowed because there the employer's pervasively unlawful conduct required the expenditure of extraordinary amounts of money.[47] Moreover, it should be noted that the purpose of an organizational drive such as that conducted by the Union is to gain majority status among the unit employees, win the representation election and obtain

---

43 Food Store Employees Union Local, No. 347 v. NLRB, 155 U. S. App. D. C. 101, 107, 476 F. 2d 546, 552, *cert. granted*, 94 S. Ct. 567 (1973). The court also noted with approval the second ground asserted by the Board in the instant case to deny payment of dues and fees. *Id.* at 107 n. 10, 476 F. 2d at 552 n. 10.

44. Union Br. at 32.

45. *Id.*

46. Tiidee Products, Inc., 194 NLRB 1234, 1236 (1972).

47. 155 U. S. App. D. C. at 106, 476 F. 2d at 551.

certification. A principal benefit gained by this process is certification as the exclusive bargaining agent for the unit. The Union here achieved this status and the one year protective period guaranteed by such certification will not begin to run until the Company begins to bargain in good faith with the Union.[48] The denial of organizational expenses to the Union must be affirmed since it was not forced to make extraordinary expenditures and those normal expenses it did incur were not rendered a complete waste.

As modified herein, the amended orders under review shall be enforced.

It is so ordered.

48. Tiidee Products, Inc., 174 NLRB 705, 714, 705-06 (1969); NLRB Br. at 33 n. 40.

UNITED STATES COURT OF APPEALS

For the District of Columbia Court

Nos. 72-1080 and 72-1365

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TIIDEE PRODUCTS, INC.,

Intervenor.

Nos. 72-1691 and 72-1692

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

Before. TAMM, MACKINNON, and ROBB, *Circuit Judges.*

ORDER

It is ordered by the Court, *sua sponte,* that the opinion of April 25, 1974 in the above entitled cases is amended as follows:

On Page 8, line 28 of text, after U. S. C. and before 499g(b), insert "§";

On Page 14, move the line at the top of the text to a point between the first and second lines of text;

On Page 16, line 8 of footnote 22, italicize the words *"Food Store, supra"*;

On Page 19, line 12 of text, strike the numeral "2", so that the letters and numerals will read: "section 8(a)(5)";

On Page 19, line 1 of the footnote, strike the brackets from the word "[i]t" so as to read "it".

Per Curiam
For the Court:
/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
Washington, D. C. 20001

April 25, 1974

Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

In Re: Nos. 72-1080—International Union of Electrical,
72-1365—Radio and Machine Workers, AFL-CIO, v. N. L. R. B.
72-1691—Tiidee Products, Inc. v. N. L. R. B.
72-1692

Dear Sir:

Enclosed is a copy of the opinion of this Court filed today in the above entitled cases. I have been directed to communicate with you and request that the National Labor Relations Board file a proposed judgment consistent with the enclosed opinion pursuant to the provisions of Rule 19 of the Federal Rules of Appellate Procedure.

Very truly yours,

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

cc: Ruth Weyand, Esquire
Alan Raywid, Esquire
Winn Newman, Esquire
Roy E. Brown, Esquire
Lawrence M. Cohen, Esquire